Practice Advisory Series

TEMPORARY PROTECTED STATUS

PENDING TPS LITIGATION

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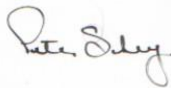
Practice Advisory Forward

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons.

This practice advisory provides a summary of the current pending Temporary Protected Status litigation. It will provide the court where the litigation is filed, the parties, and give an overview of the arguments presented in each case.

Manuals prepared by the Center are constantly being examined for improvements and updated to reflect current practices. Please feel free to email pschey@centerforhumanrights.org if you would like to suggest updates or edits to portions of this practice advisory.



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I. Introduction

This practice advisory acts as the seventh installment in a series about the United States creation, utilization, and termination of several country's Temporary Protected Status ("TPS"). This practice advisory will provide an overview of the current pending litigation challenging the Trump administration's termination of TPS for several countries.

Countries may be granted TPS, "due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."[1]

The Secretary can extend or terminate TPS after a review of country conditions. A decision about a six, twelve, or eighteen-month extension or termination must be made at least sixty days before the TPS designation expiration date. If the Secretary decides to terminate the status, the Secretary provides a transition period for the affected TPS holders in the U.S. to move back to their countries.[2]

Nicaragua was granted TPS on January 5, 1999 by Attorney General Janet Reno.[3] Its TPS designation was set to expire on January 5, 2018, and the termination is effective on January 5, 2019.[4] Haiti was granted TPS on January 21, 2010. Its TPS designation was set to expire on March 9, 2018, and the termination is effective on July 22, 2019.[5] El Salvador was granted TPS

[1] *Temporary Protected Status*, U.S. Citizenship and Immigration Services (Feb. 02, 2018) https://www.uscis.gov/humanitarian/temporary-protected-status.
[2] *Id.*
[3] Designation of Nicaragua Under Temporary Protected Status 64 Fed. Reg. ,527(Jan. 5, 1999).
[4] Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59505, 59636 (Dec. 15, 2017).
[5] Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 59505, 2648, 2548-49 (Dec. 15, 2017).

on March 9, 2001.Its TPS designation was set to expire on, March 9, 2018, and the termination is effective on September 9, 2019.[6]

II. Summary of Temporary Protected Status Litigation

As of March 15, 2018, four (4) lawsuits challenging the termination of TPS have been filed. All four lawsuits provide background information on the creation and implementation of the specific country's TPS, a summary of the significant facts provided for in the federal register designation, extensions, and termination notices explaining country conditions and whether these affected countries continued to be eligible for TPS, and evidence that the Department of Homeland Security's rescission of TPS was motivated by racial discrimination.

A. *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018)

NAACP v. DHS, No. 18-00239 (D. Md. filed Jan. 24, 2018) was filed in the U.S. District Court for the District of Maryland on January 24, 2018. The National Association for the Advancement of Colored People ("NAACP") is the named Plaintiff, and the NAACP brings this action on behalf of its members which include Haitian TPS beneficiaries. The NAACP brings this action against the Department of Homeland Security, Elaine Duke Acting Secretary of Homeland Security, and Kristjen Nielsen Secretary of Homeland Security ("Defendants").

Unlike the other cases, the NAACP emphasizes the widespread dismay created by Haitian TPS termination by including quotes from, "officials from across the political spectrum warn[ing] against TPS rescission."[7]

i. Violation of the Fifth Amendment

[6] Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 12629, 12630 (Dec. 15, 2017).
[7] *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 16-22.

The NAACP's first cause of action alleges that Defendant's "decision to rescind TPS protections for Haitians living the United States violates both aspects of the Fifth Amendment [due process and equal protection], because the Administration intended to discriminate against Haitian immigrants to the United States because of race and/or ethnicity."[8] For example Plaintiffs' allege that --,

> President Trump articulated his antipathy towards Haitians in particular in June 2017, when, during a meeting in the Oval Office with then-Homeland Security Secretary Kelly and Secretary of State Tillerson, he reportedly reacted to a document listing how many immigrants had received visas to enter the United States in 2017. Upon learning that 15,000 Haitian people had received such visas, President Trump is reported to have stated they "all have AIDS[9] … President Trump is alleged to have further disparaged Haitians in particular, asking "Why do we need more Haitians?" and ordered the bill's drafters to "take them out."[83] In this meeting, the President is further alleged to have expressed his preference for more immigrants from places like Norway,[84] where the population is over 90 percent white. Haiti's population, by contrast, is over 95 percent Black.[10]

Plaintiffs' provide further evidence of the Administration's discrimination by quoting President Trump: "We have some bad hombres here, and we're going to get them out,"'[11] and, "[w]hen Mexico send its people, they're not sending their best … They're sending people that

[8] *Id*. at 31.
[9] Michael D. Shear & Julie Hirschfeld Davis*, Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html. This article states that other officials insist that President Trump never used the words "AIDS" or "huts." Several participants in the meeting said that they did not recall President Trump using those words.
[10] Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in- oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.b56f11cc896f. Other senators have suggested the word used might have been "shithouse." Julie Hirschfeld Davis*, Trump's Harsh Words, Not His Plan for Wall, Dominate Hearing*, N.Y. Times (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/us/politics/trump-shithole-shithouse-immigration.html.
[11] Michael Scherer, *2016 Person of the Year: Donald Trump*, TIME (Dec. 2016), http://time.com/time-person-of- the-year-2016-donald-trump/.

have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists … It's coming from more than Mexico. It's coming from all over South and Central America.'"[12]

They further support the claim that Defendants' engaged in discrimination by stating, "[t]he inference of race and/or ethnicity discrimination is supported by the Administration's departure from the normal decision-making process; the fact that the decision bears more heavily on one race than another; the sequence of events leading to the decision; the contemporaneous statements of decisionmakers; and the historical background of the decision … "[13] In support Plaintiffs' allege that DHS *has* previously undertaken a careful review as to whether conditions in Haiti continued to reflect the severe problems with respect to housing, food security, infrastructure, public health, access to health care, and gender-based violence that originally resulted from the 2010 earthquake and warranted Haiti's TPS designation. Defendant Duke, however, "failed to fully consider those factors in rescinding Haiti's TPS."[14]

The NAACP also asserts that an inference of race discrimination is supported by the defendants' departure from the analysis that previous Secretaries of Homeland Security have undertaken, and from INA § 244(b)(3)'s and 8 U.S.C. § 1254a's "requirement that DHS undertake a genuine, good faith review" of the conditions in a foreign state designated for TPS to determine whether the conditions for designation continue to be met.[15] In furtherance of this claim, Plaintiffs' acknowledge,

[12] *Full text: Donald Trump announces a presidential bid*, Wash. Post (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a- presidential-bid/?utm_term=.9dd8ac586d54.
[13] *Id*. The NAACP cited as supporting case law *Vill. of Arlington Heights v. Metro. Hous. Development Corp.*, 429 U.S. 252 (1977).
[14] *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 24.
[15] *Id.* at 32.

> Defendant Duke failed to address the persistent gender-based violence in the internally displaced persons camps, which Mr. Kelly himself described as a serious concern just months earlier. Defendant Duke also failed to consider the fact that people who were displaced by the earthquake moved back to unsafe homes or were relocated to informal settlements in hazardous areas. Defendant Duke also failed to consider the extent of the damage that Hurricane Matthew caused, which Mr. Kelly noted killed more than 500 people and left more than 150,000 without housing. Defendant Duke also failed to address that 40 percent of the Haitian population lacked access to fundamental health and nutrition services. Defendant Duke also failed to address the questionable habitability of the buildings the earthquake destroyed, or conditions in the remaining internally displaced persons camps. Furthermore, although Defendant Duke noted the decrease in cholera, she failed to consider whether access to medical care had improved or whether Haiti's physical health infrastructure was restored.[16]

In addition, the NAACP alleges that defendants' "manufactur[ed] … evidence that Haitian TPS recipients engage in criminal activity ..." This is evidenced by the White House's exertion of pressure on Defendant Duke to expel tens of thousands of Hondurans …"[17] Plaintiffs' support this claim by offering evidence that, "while Mr. Kelly was Secretary of Homeland Security, DHS officials sought crime data on Haitians with TPS. DHS also sought information on how many Haitian nationals were receiving public benefits in the United States, even[a]fter USCIS staff said they could not gather information about wrongdoing …" .[70]

ii. Mandamus

The NAACP also claims, "Defendants have failed to carry out their mandatory and non-discretionary duties owed to Plaintiff," including the duties established in 8 U.S.C. § 1254a(b)(3). Plaintiff's move the court to issue a writ of mandamus, under 28 U.S.C. § 1361, to compel Defendant's to fulfill their mandatory and discretionary duties provided for under 8 U.S.C. §1254a(b)(3) (INA), the United States Constitution, and any other applicable law. 8

16 *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 24-25.
17 *Id.* at 32-33.

U.S.C. §1254a(b)(3) discusses the duties of DHS surrounding periodic review, termination, and extension of TPS.

Plaintiffs' support this claim through discussion of publication procedure,

> Although DHS published its other TPS determinations in the Federal Register within days of publicly announcing the decisions, it took DHS until January 18, 2018, to provide an analysis to support its putative reasons for the rescission decision. This unprecedented delay has disrupted the lives of TPS recipients across the country. That is because the last extension— issued on May 24, 2017 and set to expire on January 22, 2018—remained operative until DHS gave notice in the Federal Register of its November 2017 decision to rescind. Until DHS published its November 2017 decision in the Federal Register, Haitian immigrants with TPS would be unable to legally work or receive public benefits after January 22, 2018. As a result, upon information and belief, scores of Haitians with TPS lost or were denied employment and/or federal entitlements like Medicare because they were unable to timely re-apply for those benefits.[18]

iii. Declaratory Judgment

In their third claim, the NAACP moves the Court for declaratory judgment under 28 U.S.C. § 2201 because, Defendants' violations of the Constitution have injured and will continue to injure Plaintiff and its members, "including but not limited to stigmatic injury, which derives from, *inter alia*, the government's efforts to intentionally discriminate against Black immigrants to the United States, and DHS's efforts to link Haitians and/or Black immigrants to criminality and exploitation of public benefits."[19]

Plaintiffs' provide evidence of injury by quoting the current Administration, President Trump learned that 40,000 immigrants from Nigeria had received visas to enter the United States in 2017. According to news reports, he reacted by stating that, "once they had seen the

[18] *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 23.
[19] *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 34.

United States, these Nigerian immigrants would never go back to their "huts" in Africa."'[20]

Additionally, Plaintiffs' discuss injuries to Haitians through the government's special privileges directed at other immigrant communities. They state, "although Haiti and Cuba share comparable histories of persecution and economic deprivation … [the] disparity is manifest in the so-called Wet-Foot/Dry- Foot immigration policy, which … allows Cuban immigrants who reach American soil to remain and become American citizens [and]Haitians have no such special status."[21]

iv. Motion to Dismiss

On May 07, 2018 Defendants filed a Motion to Dismiss. Defendants' provided several arguments and the Court has yet to rule on the Motion.

a. This Court lacks jurisdiction to review Plaintiffs' challenge to acting Secretary Duke's TPS determination

Defendants argue, "Congress has provided that "[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state" for TPS relief. 8 U.S.C. § 1254a(b)(5)(A)." Motion to Dismiss [Dkt. # 36] at 14. Defendants support this argument by stating,

> Plaintiffs' entire Fifth Amendment argument relies on attacking the Secretary's conclusion that the current conditions in Haiti no longer warrant TPS. In other words, in plaintiffs' view, for this Court to review plaintiffs' equal protection claim, this Court would first need to review the sufficiency of Acting Secretary Duke's conclusions about Haiti—the very assessment Congress intended to foreclose from judicial review.

Id. at 15.

[20] Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html. This article states that other officials insist that President Trump never used the words "AIDS" or "huts." Several participants in the meeting said that they did not recall President Trump using those words.
[21] *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 33.

b. Plaintiffs' Fail to Allege an Equal Protection Violation

Defendants claim:

> the context of this case—a challenge to a determination about conditions in a particular country—requires that an equal protection allegation be reviewed pursuant to the rational basis framework. In evaluating plaintiffs' claim, the Court may rely on materials in the public record, which show that the Acting Secretary's decision satisfies rational basis review.

Id. at 17.

1. The Acting Secretary's Decision is Subject to Rational Basis Review

After discussing how Plaintiffs' claims are facially defective Defendants stated, "

> But if the Court were at all inclined to consider plaintiffs' equal protection claim, the most apt line of cases for the Court to consult would be those involving immigration classifications. And those immigration cases make clear that the correct standard of review for such a challenge is an exceedingly deferential rational basis standard. "When the federal government classifies aliens on the basis of nationality, the classification must be sustained if it has a rational basis."

Id. at 19 (citations omitted).

2. The Acting Secretary's Decision to Terminate Haiti's TPS Designation Was Rationally Related to a Legitimate Government Interest

Defendants support this argument by discussing statistics provided for in the DHS termination notice arguing that, 'Haiti has made "progress recovering from the 2010 earthquake."' *Id*. at 24. They note:

> TPS for Haiti served an extremely important purpose, providing temporary relief to Haitian nationals after Haiti was struck with a horrific earthquake and an ensuring cholera outbreak, which previously were found to "prevent" the return of Haitian nationals "in safety." But the Acting Secretary came to a rational conclusion that Haiti's postearthquake conditions had sufficiently improved to warrant termination of TPS for Haiti.

Id. at 25-26.

3. Plaintiffs do not meet the demanding standard for showing that the Acting Secretary's decision was motivated by discriminatory animus

Defendants attempt to argue that statements by the President cannot be imputed to the Acting Secretary. They specificially stated, "[a]bsent from plaintiffs' complaint is any allegation, or even insinuation, that the Acting Secretary has said or done anything that would suggest she personally harbored discriminatory animus against aliens covered by the designation of Haiti under the TPS statute. Instead, for direct "evidence," plaintiffs try to shift the responsibility to the White House and generally try to rely on statements by the President." *Id*.

c. Plaintiffs' Mandamus and Declaratory Judgment Act Claims Also Fail

1. Plaintiffs cannot identify any failure by the Secretary to carry out a nondiscretionary duty such as would warrant mandamus

Overall, they counter that the Acting Secretary did not engage in proper periodic reviews, extensions, and terminations of Haitian TPS.

Defendants defend this argument by stating"

> There is no plausible contention that the statute unambiguously requires the Secretary to extend TPS for Haiti under the circumstances present here. Pursuant to the TPS statute itself, Congress requires careful consideration of multiple factors by the Secretary as to whether to designate a country for TPS, to extend that designation, or to terminate that designation. 8 U.S.C. § 1254a.

Id. at 30.

v. Order Granting and Denying in Part Defendants' Motion to Dismiss

a. Jurisdiction

The Court asserted "[i]nterpreting a statutory provision to eliminate any judicial review of constitutional claims raises serious questions as to separation of powers as well as constitutional concerns. Order [Dkt. # 67] at 10. Furthermore, "the decision to terminate TPS for Haiti would be encompassed within the statutory bar, the "determination" challenged here as unconstitutional." *Id*. at 12.

Additionally, "[e]ven when statutory language would seem to preclude judicial review, however, constitutional claims remain within a court's subject matter jurisdiction if there is no "clear and convincing" evidence that Congress intended to preclude judicial review of colorable

constitutional challenges to 1254a(b)(5)(A)." *Id.* (citations omitted). In support, "[w]here Congress intends to preclude review of all constitutional claims in the INA, it has said so explicitly." *Id.* The Court held, "8 U.S.C. § 1254a(b)(5)(A) does not prohibit, as do other statutes within INA, judicial "review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions," nor does 1254a(b)(5)(A) contain any similarly restrictive language." *Id.* at 13.

b. Failure to State a Claim

1. Level of Scrutiny

The Court asserts, "*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), provides the proper legal framework to determine whether the government's decision truly was motivated by impermissible animus. *Id.* at 14. Furthermore, "[i]f it is proven that the government's decision was motivated by impermissible race or national origin discrimination, the action is presumptively invalid and will only be upheld if the action is narrowly tailored to achieve a compelling government purpose." *Id.* at 15.

When further examining the level of scrutiny the Court states:

> Plaintiffs have not alleged any direct statements of animus by Acting Secretary Duke or Secretary Nielsen. Rather, Plaintiffs rely on statements allegedly made by President Trump during his candidacy and Presidency. Defendants claim that a lack of any statement by either Secretary is the crucial link missing from the chain of racial animus which warrants dismissal. Defendants are incorrect. Even if it cannot be proven that Acting Secretary Duke or Secretary Nielsen personally harbor animus towards TPS beneficiaries from Haiti, their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated the decision-making process.

Id. at 17.

To support this finding the Court asserts:

> For example, in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 290-91 (4th Cir. 2004) (en banc), the Fourth Circuit held that courts "do not limit the discrimination inquiry to the actions or statements of formal decisionmakers[,]" because such a limitation would "thwart the very purposes of the [antidiscrimination] acts by allowing employers to insulate themselves from liability simply by hiding behind the blind approvals, albeit non-biased, of formal decisionmakers."

Id.

Next the Court must decide, "whether the challenged decision was motivated by impermissible animus." *Id*. at 18. After conceding that the White House may have played a role, "Defendants ignore that Honduras' TPS status was later rescinded by Acting Secretary Duke, that inaction or delay could reasonably not be seen as "resistance," and importantly fail to distinguish the power of President Trump's alleged statements of animus specifically targeting Haiti." *Id*. at 18-19.

c. Mandamus and Declaratory Judgment

The Court articulates the factors of mandamus relief, "[m]andamus relief is "intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Id*. at 19. The Court found, "Plaintiffs' have a direct cause of action by way of the Constitution, including for injunctive relief. *See, e.g., Bell v. Hood*, 327 U.S. 678, 684 (1946). Thus, Plaintiffs' have not exhausted all other avenues of relief." *Id*.

B. *Centro Presente v. Donald Trump,* No. 18-10340 (D. Mass. filed Feb. 22, 2018)

Centro Presente v. Donald Trump, No. 18-10340 (D. Mass. filed Feb. 22, 2018) was filed in the U.S. District Court for the District of Massachusetts on February 22, 2018. Plaintiff's represented in this lawsuit are eight recipients of TPS from El Salvador and Haiti and a non-profit organization, Centro Presente, with TPS members. Centro Presente and the five individuals bring this action against President Donald J. Trump, the Department of Homeland

Security, Elaine Duke Acting Secretary of Homeland Security, and Kristjen Nielsen Secretary of Homeland Security ("Defendants"). Plaintiffs' seek, "declaratory judgment that the Trump Administration's termination of TPS designation for those two countries should be set aside as unconstitutional and contrary to federal law and further enjoining the Administration from violating Plaintiffs' Constitutional rights."[22]

Unlike the other cases, *Centro Presente* provides an analysis of the, "harms and effects of Defendants' discriminatorily motivated actions."[23] Plaintiffs' allege,

> If TPS rescission goes into effect, Plaintiffs, and other TPS beneficiaries will suffer immediate and irreparable injuries to their rights under the U.S. Constitution and federal law; to their proprietary interests; and to their dignity. Without TPS, most beneficiaries will not have access to employment authorization which gives these immigrants (and their employers) an assurance that they may put their talents to use – something that benefits Massachusetts and the country as a whole. Without employment, many TPS beneficiaries will also lose health benefits. Plaintiffs and other TPS beneficiaries will have to prepare for imminent removal. Plaintiffs will incur costs to ensure that their property rights, family relationships, and tax obligations are protected. [TPS] rescission stigmatizes immigrants of color, as well as their children and families, and imposes a dignitary harm by denying them the dignity and respect they deserve under the U.S. Constitution and federal law. By labeling TPS beneficiaries from El Salvador and Haiti as undesirable. . . the federal government ratifies and legitimizes the notion that immigrants of color. . . are worthy of lesser social stature. [24]

i. Violation of Equal Protection Clause

In their first cause of action Plaintiffs' claim, "Defendants' decision to rescind TPS protections for Salvadoran and Haitian immigrants living in the United States violates the Fifth Amendment because it constitutes intentional discrimination against both groups on the basis of race, ethnicity, and/or national origin."[25] Like the NAACP, Centro Presente supports their claims

[22] *Centro Presente v. Donald Trump*, No. 18-10340 at 1 (D. Mass. filed Feb. 22, 2018).
[23] *Id*. at 31.
[24] *Id*. at 31-32.
[25] *Centro Presente v. Donald Trump*, No. 18-10340 at 1 (D. Mass. filed Feb. 22, 2018).

by alleging an inference of discrimination through, "the Trump Ad ministration's departure from the normal decision-making process. ; t."[26] Plaintiffs' claim there was a departure from the normal decision-making process by asserting, "[u]nlike the extensions of Haiti's TPS protection in other Administrations, Defendants failed to mention the numerous natural disasters Haiti recently experienced, the slow process of economic and infrastructural recovery described in recent extensions, the remaining food scarcity, or the persistent reports of gender-based violence."[27]

Defendants' deviate from INA § 244(b)(3)'s and 8 U.S.C. § 1254a's requirement that DHS, "undertake a genuine, good faith review of the conditions in a foreign country designated for TPS to determine whether the conditions for designation continue to be met."[28] Plaintiffs' assert there was no genuine, good faith review of country conditions, because Defendants' ignored such facts, "that the situation in Haiti is destitute." Plaintiffs' cite the U.S. Department of State who notes that gender-violence such as "rape . . . and societal discrimination against women" remains a serious problem, [and]Haiti still contains a high number of internally displaced persons including "14,000 people displaced by Hurricane Matthew" and "several thousand street children" in Port-Au-Prince."[29] Against this background, the country's reconstruction and development is far from complete.

Lastly, Plaintiffs' allege, "President Trump's comments. . . which informed practice in executive agencies,"[30] is discriminatory." Plaintiffs' support this claim, [w]hile being briefed on

[26] *Id*. at 33.
[27] *Id*. at 25.
[28] *Id*. at 33.
[29] U.S. Dep't of State, Haiti 2016 Human Rights Report 1, 24 (2016).
[30] *Id*.

the proposal to reallocate visas to TPS recipients, President Trump is reported to have grown angry and incredulous at the terms of the proposed plan. He specifically derided individuals from terminated TPS nations, asking: "Why are we having all these people from shithole countries come here?"[31]

ii. Violation of Due Process

Plaintiffs' also allege, a Due Process violation, prohibiting irrational government action and in turn, "defendants have failed to carry out their duties. . ." Additionally, Plaintiffs' expand on the due process violation asserting, "[t]he Defendants' discriminatory decision to rescind TPS for Salvadorans and Haitians deprives Plaintiffs' of the appropriate and non-discriminatory process due to them under the law."[32] In addition to the examples stated under subparagraph (i), Plaintiff's assert, Defendants' analysis of the situation in Haiti, "conflicts sharply with the federal government's own reports and analysis released by the Department of State which consistently reflect the conditions described in the Federal Register for Haiti's TPS extensions."[33] For example, the Department of State has noted that in Haiti "violent crime such as armed robbery, is common, [and]local police may lack resources to respond effectively to serious crimes or emergencies."[34]

iii. Mandamus

As previously described in *NAACP v. DHS*, Plaintiffs' in *Centro* seek a writ of mandamus. Plaintiffs' claim, Defendants have failed to carry out their mandatory and non-

[31] Eli Watkins & Abby Phillip. *Trump Decries Immigrants from 'shithole countries' Coming to the US*, CNN, (Jan. 12, 2018) (available at: https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html).
[32] *Id.* at 34. Plaintiffs rely on *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 532-33 (1973) to support their assertion that the Due Process Clause prohibits irrational government action.
[33] *Id*. at 25.
[34] U.S. Dep't of State, Travel Advisory on Haiti (last updated Aug. 2, 2017).

discretionary duties owed to Plaintiffs [which], "irrevocably harm Plaintiffs."[35] By not engaging in a genuine review of country conditions and rescinding TPS,

Plaintiffs and other TPS beneficiaries will be denied work, including workplace benefits and protections. Without TPS, most beneficiaries will not have access to employment authorization which gives these immigrants (and their employers) an assurance that they may put their talents to use – something that benefits Massachusetts and the country as a whole. Without employment, many TPS beneficiaries will also lose health benefits. Plaintiffs and other TPS beneficiaries will have to prepare for imminent removal. Plaintiffs will incur costs to ensure that their property rights, family relationships, and tax obligations are protected. These financial burdens will decrease the overall resources available to TPS beneficiaries and their families.[36]

iv. Declaratory Judgment

As its fourth cause of action, Plaintiffs' seek declaratory judgment because Defendants' violated the U.S. Constitution and other laws … . Plaintiffs' further claim, "Defendants' illegal actions have injured and will continue to injure all Plaintiffs and those similarly situated."[37] Plaintiffs' provide ample evidence of current and future injury by stating,

> Rescission stigmatizes immigrants of color, as well as their children and families, and imposes a dignitary harm by denying them the dignity and respect they deserve under the U.S. Constitution and federal law. TPS rescission triggers and fuels social stigma, harassment, discrimination, and even violence against immigrants of color. By labeling TPS beneficiaries from El Salvador and Haiti as undesirable and by contrasting them with immigrants from predominantly white countries such as Norway, the federal government ratifies and legitimizes the notion that immigrants of color -- particularly those deemed by President Trump to come from "shithole countries" -- are worthy of lesser social stature. This

[35] *Centro Presente v. Donald Trump*, No. 18-10340 at 1 (D. Mass. filed Feb. 22, 2018) at 35.
[36] *Id*. at 32.
[37] *Id*.

> compromises their well-being and encourages discrimination against immigrants of color. In this manner, the Trump Administration's decision to terminate TPS for these countries has caused, is causing, and will continue to cause dignitary harms and psychological injuries to families and children.[38]

v. Motion to Dismiss

On May 23, 2018 Defendants filed a Motion to Dismiss [Dkt. # 25].

a. This Court lacks subject-matter jurisdiction over Plaintiffs' claims

Like in *NAACP*, Defendants raise the same argument that, "[t]his judicial review preclusion provision forecloses all claims in this Court relating to the Secretaries' TPS determinations, constitutional and otherwise." Motion to Dismiss [Dkt. # 25] at 13. They continue:

> The premise of Plaintiffs' constitutional claims illustrates why this matter is not subject to judicial review in this Court. Plaintiffs' entire Fifth Amendment argument rests on their assumption that country conditions in Haiti, El Salvador, and Honduras continue to warrant TPS designations for those countries, such that the Secretaries' stated determinations to the contrary must somehow reflect other, illegitimate considerations. *See* Am. Compl. ¶ 6, ECF No. 21 … In other words, for this Court to review Plaintiffs' equal protection claim, the Court would first need to probe the sufficiency of the Secretaries' "stated reasons for terminating TPS," *id.*— the very assessment that Congress expressly foreclosed from judicial review.

Id.

b. Even if reviewable, Plaintiffs' claims fail on their merits

1. Plaintiffs Fail to Allege an Equal Protection Violation in Counts 1 and 2—the challenged TPS decisions are subject to rational-basis review

Defendants argue, "Plaintiffs' equal protection claims are facially defective because this case does not involve classifications of groups of aliens for favored (or disfavored) treatment of

[38] *Id*. at 32-33.

individuals on the basis of their individual immutable characteristics. It rather involves the assessment of internal conditions in Haiti, El Salvador, and Honduras …" *Id*. at 15.

Defendants offer the same arguments presented in the *NAACP* and stated, '"[a]s a function of those country-specific decisions, of course, TPS determinations do have disparate effects upon individuals based on their "national[ity], …' but "TPS determinations, however, are not made, extended, or terminated because of any individuals' race, ethnicity, or national origin." *Id*. at 15. (citation omitted).

2. The challenged TPS decisions are rationally related to a legitimate government interest

Defendants simply quoted aspects of each termination notice as to why the termination of TPS is rationally related to a legitimate government interest for each country. Defendants indicated that,

> The Secretaries' decisions to terminate TPS for Haiti, El Salvador, and Honduras were in keeping with those prior decisions and consistent with Congress's objective of providing *temporary* relief (subject to mandatory agency review after designated intervals) for nationals of a country recovering from a disaster until such nationals, who have not attained other lawful immigration status in the United States, can safely return home.

Id. at 18.

3. Plaintiffs do not meet the demanding standard that would be necessary for establishing that the challenged TPS decisions were based on discriminatory animus rather than articulated grounds

Defendants argued, "Plaintiffs fall far short of setting forth "clear evidence" that the Secretaries' TPS decisions were beset by "outrageous" discrimination rather than an assessment of statutorily identified conditions." *Id*. at 21. Defendants reiterate the same arguments presented in *NAACP*, claiming that,

> Absent from the Amended Complaint is even any allegation that former Acting Secretary Duke and Secretary Nielsen have said or done anything that would suggest these officials may have personally harbored discriminatory animus against Haitians, Salvadorans, or Hondurans. Instead, for direct "evidence," Plaintiffs try to shift responsibility to the White House and generally try to rely on reported statements by the President (most of which had nothing to do with TPS).

4. Plaintiffs Arbitrary-and-Capricious and Notice-and-Comment Claims are unreviewable and in any event factually and legally meritless

They counter Plaintiffs arbitrary and capricious argument and stated, "[i]ndeed, decision makers in the current and previous Administrations have recognized that extension of TPS is appropriate where conditions that prompted designation continue to exist, not because conditions in a country are generally fragile." *Id*. at 24. They further note,

> Plaintiffs' notice-and-comment claim (Count 4) fails for the same reason: nothing about the approach Acting Secretary Duke and Secretary Nielsen took in their decision making as set forth in the *Federal Register* is inconsistent with past practice, so Plaintiffs' allegation that "Defendants abandoned without explanation or justification their well-established standard for reviewing [TPS] designations and . . . enacted a rule eliminating TPS designations founded on environmental conditions," Am. Compl. ¶ 278, is simply incorrect.

Id. at 25.

Defendants provide further support for their argument and stated, "DHS has never codified the factors the Secretary must or will consider, or the weight the Secretary must assign to each factor, in any regulation: those matters are left to the Secretary's judgment. And a mere change in interpretation does not implicate the APA's notice-and-comment rulemaking requirements." *Id*.

5. Mandamus is unavailable and the Declaratory Judgment Act does not create a freestanding cause of action

Defendants argue," [e]ven if mandamus could conceivably issue in this context, such relief is available only where the defendant owes the plaintiff a clear, nondiscretionary duty, and all other avenues for relief are exhausted." *Id*. at 26. In support they note:

> There is no plausible contention that the INA unambiguously required the Secretaries to extend TPS for Haiti, El Salvador, and Honduras under the circumstances present here. Rather, pursuant to the statute, Congress requires the Secretary to consider multiple factors to decide whether to designate a country for TPS, to extend that designation, or to terminate the designation.

Id.

vi. Brief in Opposition to Defendants' Motion to Dismiss

a. The Administration's unconstitutional terminations of the TPS program are subject to judicial review

In support of this argument Plaintiffs state:

> Section 1254a(b)(5)(A) is conspicuously silent as to constitutional claims, barring only "judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." Section 1254a(b)(5)(A) lacks *any* indication, much less a clear one, that Congress intended to preclude review of colorable constitutional claims. This silence is no oversight; even within the immigration code itself, where Congress has intended to preclude review of constitutional claims, it has done so explicitly.

Brief in Opposition to Defendants' Motion to Dismiss, [Dkt. # 35] at 9. (citation omitted).

b. The complaint's allegations of invidious discrimination are more than sufficient to proceed to discovery

Plaintiffs posit, '"[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the [government's] decision, . . . judicial deference is no longer justified," (citation omitted) and "[t]he allegations in the Complaint, not least of which are Defendant Trump's

repeated public statements, more than satisfy the *Arlington Heights* standard to plead a racially discriminatory purpose underlying the TPS terminations." *Id*. at 12.

1. **The complaint more than sufficiently alleges that TPS terminations were motivated by racially discriminatory intent**

Under this subparagraph Plaintiffs argue that,

> In order to determine whether invidious discriminatory purpose underlies government action, the Supreme Court prescribed a non-exhaustive list of factors in *Arlington Heights* for courts to analyze: "[1] the degree of disproportionate racial effect, if any, of the policy; . . . [2] the legislative or administrative historical background of the decision," *Anderson*, 375 F.3d at 83, "[3] the specific sequence of events leading up to the challenged decision; [4] departures from the normal procedural sequence; [5] any contemporary statements by members of the decisionmaking body, and [6] substantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached,"' *Id*. at 12-13.

Plaintiffs provide arguments for the aforementioned factors the first being, "the TPS terminations for Salvadoran, Haitian, and Honduran immigrants have a disproportionate adverse effect on Latino and Black persons." *Id.* at 13. Second, the historical background of Defendants' TPS terminations, the sequence of events before, during, and after the Administration's TPS decisions, and the contemporary statements made by the decision-makers all evidence a pattern of racially discriminatory animus against Latino and Black immigrants." *Id*. (Plaintiffs provide several pages of examples from the Administration of racially charged statements). Third, "the Amended Complaint sets forth in considerable detail how the Defendants' terminations of TPS reflect marked departures from normal processes of prior administrations, as well as the processes required by the law itself for consideration of TPS designations and extensions." *Id*. at 16.

1. **Defendants' argument for deferential treatment of immigration classification is misplaced**

Arguing that although enactment of the TPS statute is based on countries, not individuals, "[w]hatever discretion is afforded to Congress and the Executive branch in the field of immigration, it does not encompass discrimination on the basis of race." *Id.* at 19. Furthermore, "Defendants' reliance on authority supporting rational-basis review with respect to immigration classifications does not address Plaintiffs' Fifth Amendment claims founded on racially discriminatory animus." *Id*.

2. Defendants' attempt to seek review of Plaintiffs' claims as selective enforcement fares no better

Plaintiffs argue, "[t]he allegations in the Complaint—that a governmental policy is impermissibly infected by racial bias—place it squarely within the *Arlington Heights* framework, which removes it from the purview of authority resolving individual selective enforcement claims cited by Defendants." *Id*. at 21.

c. Defendants' attempts to evade review under Administrative Procedure Act are likewise unavailing

As argued in their memorandum Plaintiffs stated:

> First, limiting review to the original conditions giving rise to the designation is contrary to the plain language of the TPS statute and is therefore arbitrary and capricious. Second, even if Defendants' interpretation were correct, it flies in the face of decades of consistent Executive practice, and it has not been implemented with the procedural protections guaranteed by the APA.

Id. at 22.

1. Defendants' Implementation of an Erroneous Rule Restricting the Application of TPS is not barred from judicial review

Ultimately this seems to hinge on the term determination. Defendants are arguing that the statute prohibits judicial review of any determinations as to designations, extensions, or terminations of TPS. Plaintiffs are arguing that they, "do not challenge

the substance of the particular determinations terminating TPS for El Salvador, Haiti, and Honduras. *See supra* pt. I. Rather, Plaintiffs allege 1) that Defendants' legal interpretation of the TPS statute is erroneous; and 2) that Defendants have adopted this new (and erroneous) legal interpretation without the required statutory process. *Id.* As such, Section 1254a(b)(5)(A)'s judicial review bar is inapplicable, as is the APA's bar to judicial review. (citation omitted).

2. Defendants' application of a new restrictive rule is unsupported by the law, flies in the face of decades of practice, and is evidenced not least by Defendants' own repeated statements announcing the termination of El Salvador, Haiti, and Honduras

To support this argument Plaintiffs claim,

> Defendants have come up with a new and erroneous interpretation of the law, one in which the DHS Secretary is only allowed to look back narrowly to the original reason for TPS designation. Defendants' novel enforcement policy is unsupported by the law it purports to execute and therefore constitutes an unlawful arbitrary and capricious act.

Id. at 24.

Plaintiffs provided an overview of the applicable law citing,

> The plain language of 8 U.S.C. § 1254a requires DHS to analyze the conditions of each TPS country and determine if any of the statutory criteria of subsection (b)(1) are *currently existing*. *Id.* § 1254a (b)(3)(A) ("[T]he Attorney General . . . shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine *whether the conditions for such designation under this subsection* continue to be met.") (emphasis added).
>
> The point is re-emphasized in the subsection concerning extensions, which requires designations to be extended unless the DHS Secretary determines that the country "no longer meets the conditions for designation under paragraph (1)." *Id.* § 1254a(b)(3)(C). Paragraph (1), in turn, sets forth all three categories that may support designation (*i.e.*, armed conflict; environmental disaster; and "any other circumstance where there are temporary or extraordinary conditions that prevent nationals from returning to their home countries in safety").

Id. at 25.

3. Even if the Administration's interpretation was lawful, Defendants have failed to adhere to the procedural safeguards

As an additional argument Plaintiffs claim, "[t]he Administration's incorrect and unlawful application of the law is evidenced by its inconsistency with decades of TPS extensions based on consideration of conditions that arose *after* the event upon which the original designation was based." *Id*. at 26.

d. The President, whose racial animus is the foundation of this complaint, is a proper party defendant

Plaintiffs claim that there is no cause to dismiss Defendant Trump because, "[t]o the extent that this Court is required to undertake any evaluation of separation-of-powers concerns, such evaluation would occur only prior awarding injunctive relief to Plaintiffs. Plaintiffs are not currently seeking provisional relief, and all of Defendants' authority is inapposite in that respect." *Id*. at 29.

vii. Reply in Support of Defendants' Motion to Dismiss FAC

a. Congress expressly excluded judicial review of TPS determinations

Defendants' reiterate the same arguments and the first is: "Congress expressly excluded judicial review of TPS determinations. They now offer that Congress has the power to modify the statute and change the limitations placed on judicial review.

b. Plaintiffs have neither pleased a plausible equal protection violation nor identified the appropriate standard of review for any such claim

Country-Based determinations do not implicate equal protection

Defendants argued,

> Each TPS decision is fact-bound, and the Secretary's choice to designate or redesignate a country for TPS or to extend or terminate an existing TPS designation for any given country has no bearing on the decision for any other

> country or on the rights of other persons—including nationals of the subject country with other lawful immigration status.
>
> Because Plaintiffs cannot show that the challenged TPS decisions were tantamount to treating a group of *persons* differently because of their race or national origin, Plaintiffs' equal protection theory is a poor fit for the facts of this case.

Id. at 4.

Plaintiffs have not set forth "clear evidence" of "outrageous" discrimination

Defendants continue to argue for a line of cases that support the notion that TPS determinations impact individuals on the basis of nationality not race or alienage and therefore continues to fall under rational basis review.

Plaintiffs must set forth facts amounting to "clear evidence" of "outrageous" discrimination by the Secretaries. Plaintiffs have not done so. Instead, they rely on reported statements by persons outside the TPS decisionmaking tree, DHS press releases that mention TPS only in passing, and allegations of pressure by White House officials.

Id. at 7. (citations omitted).

The TPS Decisions were rational, and that is all the due process clause requires

In supporting their argument that rational basis review applies Defendants claim:

> To be sure, under rational-basis review, a court would rightly enjoin as unconstitutionally irrational any governmental action that could only be explained by animus against a group bound by a common, immutable trait. As explained, however, the Secretaries' decisions here are rationally explained by their analysis of the various country conditions.

Id. at 9.

c. The Secretaries' decisionmaking process, as reflected by the Federal Register Notices, was consistent with the statutory framework and with past practice

Defendants alleged:

> Subparagraph (A) of 8 U.S.C. § 1254a(b)(3) directs the Secretary to periodically "review the conditions in the foreign state . . . for which a [TPS] designation is in effect . . . and . . . determine whether the conditions *for such designation* . . . continue to be met." 8 U.S.C. § 1254a(b)(3)(A) (emphasis added). "Such designation" plainly refers to the antecedent decision to designate a country for TPS under one of the three qualifying circumstances (armed conflict, disaster, extraordinary conditions). It does not, as Plaintiffs suggest, impose on the Secretary a recurring obligation to assess whether *any* of those qualifying circumstances might apply and, if so, to extend TPS accordingly.

Id. at 12.

i. Plaintiffs' Sur-reply in further Opposition to Defendants' Motion to Dismiss FAC

Plaintiffs file this sur-reply to address, "two decisions issued after Plaintiffs filed their Brief in Opposition, ECF 35 ("Opposition") and cited in the Reply: *Trump v. Hawaii*, 585 U.S. __, No. 17-965, slip op. (U.S. June 26, 2018), and *Ramos v. Nielsen*, No. 18-cv-01554-EMC, 2018 U.S. Dist. LEXIS 105988 (N.D. Cal. June 25, 2018)." Plaintiffs' Sur-reply in further Opposition to Defendants' Motion to Dismiss First Amended Complaint [Dkt. # 43] at 1.

a. *Trump v. Hawaii* does not shield all executive action from judicial review

1. Because TPS determinations involve recipients already lawfully present in the US, not exclusion decisions, *Trump v. Hawaii* is inapposite

Plaintiffs argue,

> TPS does not concern the government's plenary authority to exclude individuals from the United States before entry. *Contrast Trump v. Hawaii*, slip op. at 30-31 (citing, *inter alia*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). TPS recipients are lawfully present in the United States, and the rights afforded to such non-citizens are substantially different in character to those who seek admission to the United States.
>
> Defendants' discretion concerning TPS terminations—which impact the rights of individual Plaintiffs here and of thousands of others already in the country for years, and in some cases since 1999—is far more constrained, on both a constitutional and statutory basis, than that considered in *Trump v. Hawaii*, such that the demands for deference are unsupported.

2. **Because the TPS Termination Do Not Involve National Security *Trump v. Hawaii* is inapposite**

The argument presented stated,

> The TPS terminations of El Salvador, Haiti, and Honduras are not grounded in national security additional reason, *Trump v. Hawaii* is in large respect inapt to the Court's evaluation of Defendants' conduct surrounding the TPS terminations …
>
> *Trump v. Hawaii* recognized that "'when it comes to collecting evidence and drawing inferences' on questions of national security," courts have more limited competence. Slip op. at 31-32. But that statement has no bearing here, where national security concerns are not even averred, much less cited.

Id. at 5.

3. **Because TPS Terminations are constrained by statue, *Trump v. Hawaii* is inapposite**

Plaintiffs offer the following argument:

> Defendants are charged with evaluating specific statutory conditions, after inter-agency review, and their failure to follow these congressional mandates runs afoul of the law. The multi-factor analysis required by the TPS statute is far removed from Defendant Trump's exceptionally broad authority to make exclusion decisions by proclamation "[w]henever [he] finds that the entry of any aliens or class of aliens into the United States would be detrimental to the interests of the United States." *See Trump v. Hawaii*, slip op. at 10 (quoting 8 U.S.C. § 1182(f)).

Id. at 6.

4. **Because *Trump v. Hawaii* assessed claims on the merits and examined extrinsic evidence, it undermines Defendants' arguments for dismissal under Rule 12(b)(6)**

As stated in their sur-reply, "[m]oreover, the Supreme Court [in *Trump v. Hawaii*] did not mandate dismissal of the action, notwithstanding its review of the merits … *Trump v. Hawaii* offers no basis to dismiss this action at the pleading stage, assuming Plaintiffs' well-pleaded factual allegations as true." *Id*. at 7.

b. *Even if Plaintiffs' claims are not evaluated under strict scrutiny, there are sufficient allegations to proceed*

In support Plaintiffs posit:

> For the reasons discussed above, *Trump v. Hawaii* does not alter this Court's rule of decision with respect to Plaintiffs' constitutional claims. In the circumstances here, where individuals are lawfully present in the country, there are no stated national security concerns, and the statute limits Executive discretion, the well-established *Arlington Heights* line of cases governs the analysis.

Id. at 8.

c. *Ramos v. Nielsen* provides persuasive authority for why Defendants' motion to dismiss should be denied here

Plaintiffs noted that the Court in *Ramos*, "held that 8 U.S.C. § 1254a(b)(5)(A) does not bar claims challenging the government's adoption of general policies or practices employed in making TPS determinations as a whole." *Id*. at 9 (citation omitted). To provide context Plaintiffs offer, "[t]he order specifically reasoned, as Plaintiffs here have argued, that the claim concerns "Defendants' adoption of a new rule employed in the evaluation of whether to extend or terminate a TPS designation." *Id*.

Second:

> the court found that the plaintiffs' allegations were sufficient to plead an APA claim based on the defendants' departure from agency practice and procedure and their failure "to provide a 'reasoned explanation' for departures from prior agency prices or policies." *Id.* at *4 (citing *Fed. Commc'ns Comm'n v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). In addition, the court found that defendants' argument that no change at all had occurred could not serve as the basis for a Motion to Dismiss where plaintiffs had plausibly alleged that such a change occurred.

Id. at 9

Moreover, "[a]t the absolute minimum, there are both legal and factual disputes regarding Defendants' current interpretation of the TPS statute, and whether it comports with the interpretations and actions of prior administrations." *Id*.

viii. Defendants' Answer to First Amended Complaint

Defendants provided short answers to each paragraph in Plaintiffs' First Amended Complaint.

C. *Ramos v. Nielsen,* No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018)

Ramos v. Nielsen, No. 18-01554 (N.D. Cal. filed Mar. 12, 2018), is a class action filed in the United States District Court Northern District of California on March 12, 2018. The class, made up of children of TPS beneficiaries, brought this action against Kristjen Nielsen Secretary of Homeland Security, Elaine Duke Deputy Secretary of Homeland Security, the Department of Homeland Security, and the United States of America. The proposed class is represented by counsel from the National Day Laborer Organizing Network ("NDLON"), the American Civil Liberties Union of Southern California, and Sidley Austin LLP.

i. Class Definition

Plaintiffs' represented in this class action are, "U.S. citizen children, their non-citizen parents, and other non-citizen adults who are in the United States legally, and who have lived in this country lawfully for years, in some cases decades,[39] and the [m]inor plaintiffs seek to represent the following nationwide class: The U.S. citizen children, from ages five to eighteen, of all TPS holders from El Salvador, Haiti, Nicaragua, and Sudan."[40]

Plaintiffs' propose that the class satisfies the Federal Rules of Civil Procedure. For example, the class is so numerous that joinder is impracticable because, "there are tens of thousands of U.S. citizen children of TPS holders from El Salvador, Haiti, Nicaragua, and

[39] *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018).
[40] *Id*. at 29

Sudan, [and]thousands of those children are minors confronted with the possibility of losing either the ability to live in their country or the care and support of a TPS-holder parent."[41]

ii. Violation of Due Process Clause of the Fifth Amendment

Plaintiffs' raise a claim alleging a violation of the Due Process Clause of the Fifth Amendment, which implicate "[t]hree such fundamental rights."[42] Unlike the other case, Plaintiffs' uniquely describe the three fundamental rights violations stating,

> Defendants' new rule violates the constitutional rights of school-age United States citizen children of TPS holders, by presenting them with an impossible choice: they must either leave their country or live without their parents. It is well established that a U.S. citizen has an absolute right to reside in this country. It is equally well established that families have a fundamental right to live together without unwarranted government interference.[43]

Plaintiffs' also assert, "[a]s with any child, their well-being and future development are tied to nurturing and stable relationships with their parents.. Plaintiffs' note, [t]he most important factor in the development of brain architecture—the trillions of connections among and across neurons in a child's brain—is the interactive and responsive relationship between child and parent.[44]=

Plaintiffs' describe the second fundamental right violationfor at so long as these U.S. citizen plaintiffs remain minors, "they have a fundamental right protected by both the First and Fifth Amendments to live with and be raised by their parents."[45] They assert, "U.S. citizen children of TPS holders face an impossible choice between the care and support of their

[41] *Id.*
[42] *Id.* at 31.
[43] *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 2.
[44] Center on the Developing Child at Harvard University, *Three Principles to Improve Outcomes for Children and Families* 3–4 (2017), http://www.developingchild.harvard.edu.
[45] *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 31.

parents, and the rights and benefits of U.S. citizenship."[46] Children can continue to live with their parents, but only by "relocating to a foreign country, leaving behind their schools, their communities, and the benefits of living in the U.S. . ." Plaintiffs' retort or, "they can choose to remain in the U.S., but then must give up living with one or both parents. . ."[47] Plaintiffs' further support this assertion by providing declarations of children of TPS recipients,

> Plaintiff Crista Ramos, fourteen years old, is the eldest child of TPS holder Plaintiff Cristina Morales. Crista was born in Marin, California, and is now an eighth grade student at Saint Raphael School. She is currently applying to high school and dreams of being an immigration lawyer. She lives with her mother, father, and her eleven-year-old brother Diego in San Pablo, California. Crista worries about what will happen if her mother loses her TPS status and is deported because she depends on her. She has never lived in or traveled to El Salvador.[48]

Plaintiffs' describe the third fundamental right violation, [t]he government's decision to end the lawful immigration status of their parents, "impinges upon the U.S. citizen plaintiffs' constitutionally-protected liberty interests."[49] Plaintiffs' also assert, "these American children have a powerful interest in not being compelled to choose between two alternatives when each alternative will deprive them of a substantial, constitutionally-protected aspect of liberty."[50] In furtherance of this claim Plaintiffs' provide additional declarations of TPS recipients stating,

> Plaintiff Imara Ampie, forty-five years old, was born and raised in Managua, Nicaragua. In August 1998, at the age of twenty-six years old, Imara traveled to the United States to procure material for her mother's tailoring business. While she was in the United States, Nicaragua was devastated by Hurricane Mitch and the U.S. government designated Nicaragua for TPS. She married a Nicaraguan TPS holder, and they are raising two young sons. Imara is a homemaker and cares for their children. Imara has lived in the Bay Area for twenty years. She and her family have

46 *Id*. at 12.
47 *Id* at
48 *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 12.
49 *Id*. at 31.
50 *Id*.

> owned a home in Contra Costa County in northern California since 2008. She is concerned that if TPS for Nicaragua is terminated, she and her husband may be forced to return to Nicaragua even though their lives and family are here, and there will be inadequate options to satisfy the health care and educational needs for her family. Her children would suffer if forced to relocate to Nicaragua, but would also face tremendous obstacles if forced to remain in the United States without their parents.[51]

iii. Violation of Equal Protection Guarantee

Like the aforementioned cases, Plaintiffs' contend, "defendants' new rule violates the Fifth Amendment's Due Process Clause . Plaintiffs' claim, [t]he rule violates the Equal Protection guarantee of the Due Process Clause because, "Defendants' decision to terminate the TPS designations for El Salvador, Haiti, Nicaragua, and Sudan [is] …motivated, at least in part, by intentional discrimination based on race, ethnicity, or national origin."[52] Plaintiffs' in *Ramos* repeat many of the same racist, discriminatory remarks evidenced in the other lawsuits, but they also assert, "[b]oth during his campaign and after taking office, President Trump has repeatedly compared immigrants to snakes who will bite and kill anyone foolish enough to take them in."[53]

iv. Violation of Due Process Clause

Their third claim maintains, "[t]he new rule constitutes an arbitrary, unexplained abandonment of the government's longstanding interpretation of the TPS statute, on which several hundred thousand people have come to rely."[54] Plaintiffs' support this claim citing the actions of former Attorney Generals, "[they] considered intervening natural disasters, conflicts, and other serious social and economic problems as relevant factors when deciding whether to

[51] *Id*. at 17.
[52] *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 32.
[53] *"The Snake": Donald Trump brings back his favorite anti-immigrant fable at CPAC* (Feb 23, 2018), https://www.vox.com/policy-and-politics/2018/2/23/17044744/trump-snake-speech-cpac.Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), https://nyti.ms/2DEQLyv.
[54] *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 3.

continue or instead terminate a TPS designation."[55] Plaintiffs' also note, [a]lthough no relevant statute or regulation has changed in the intervening decades, "the Trump administration's DHS has now taken a position that such factors cannot be considered."[56]

Plaintiffs' provide further evidence that he Administration adopted the new interpretation without a, "formal announcement to disclose its rationale for making a dramatic change to a decades-old policy."[57] Plaintiffs' also allege the change became public during testimony by then-Secretary Kelly at a Senate hearing on June 6, 2017, [and]Secretary Kelly stated "'the program [TPS] is for a specific event, and [i]n – in Haiti, it was the earthquake." [58] Plaintiffs' continue to quote Secretary Kelly, "[y]es, Haiti had horrible conditions before the earthquake, and those conditions aren't much better after the earthquake. But the earthquake was why TPS was—was granted and – and that's how I have to look at it."[59]

Plaintiffs' use El Salvador's termination as a prime example of this new rule,

> El Salvador was most recently designated for TPS on March 9, 2001 after three devastating earthquakes.[60] All told, various administrations continued TPS for El Salvador eleven times based on a variety of factors and conditions that did not exist at the time of the original designation, and that were unrelated to the earthquakes.[61] Among other considerations, they cited droughts

[55] *Id*. at 21.
[56] *Id*.
[57] *Hearing on the Department of Homeland Security F.Y. 2018 Budget Before the S. Comm. onHomeland Security and Governmental Affairs*, 115th Cong. (June 6, 2017) (statement of Secretary John F. Kelly), *available at* https://www.c-span.org/video/?429383-1/secretary-kelly-travel-ban-injunctions-hobbling-homeland-security-screening-effort&start=5492.
[58] *Id*.
[59] *Id*.
[60] A devastating, 7.6 magnitude earthquake hit El Salvador on January 13, 2001, followed by over 3,000 aftershocks. The earthquakes killed over 1,100 people, damaged or destroyed approximately 220,000 homes, 1,696 schools, and 856 public buildings, and affected approximately 1.5 million people. Designation of El Salvador Under Temporary Protected Status, 66 Fed. Reg. 14,214 (Mar. 9, 2001).
[61] *See* Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,647 (July 8, 2016); Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 894 (Jan. 7, 2015); Extension of the Designation of El

and a leaf rust epidemic that caused destabilizing food insecurity and malnutrition,[62] health emergencies,[63] subsequent environmental disasters, including another earthquake in 2012, volcanic eruptions, hurricanes, mudslides and flooding,[64] economic instability, and crime[65] as grounds for continuing TPS. But when terminating TPS

Salvador for Temporary Protected Status, 78 Fed. Reg. 32,418, 32,419 (May 30, 2013); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 77 Fed. Reg. 1710, 1711–12 (Jan. 11, 2012); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 75 Fed. Reg. 39,556, 39,557–58 (July 9, 2010); Extension of the Designation of El Salvador for Temporary Protected Status, 73 Fed. Reg. 57,128, 57,129 (Oct. 1, 2008); Extension of the Designation of El Salvador for Temporary Protected Status, Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 72 Fed. Reg. 46,649, 46,649–50 (Aug. 21, 2007); Extension of the Designation of Temporary Protected Status for El Salvador, Automatic Extension of Employment Authorization Documentation for El Salvadorian TPS Beneficiaries, 71 Fed. Reg. 34,637, 34,638 (June 15, 2006); Extension of the Designation of Temporary Protected Status for El Salvador, Automatic Extension of Employment Authorization Documentation for El Salvador TPS Beneficiaries, 70 Fed. Reg. 1450, 1451 (Jan. 7, 2005); Extension of the Designation of El Salvador Under Temporary Protected Status Program, Automatic Extension of Employment Authorization Documentation for El Salvador, 68 Fed. Reg. 42,071, 42,072 (July 16, 2003); Extension of the Designation of El Salvador Under the Temporary Protected Status Program, Automatic Extension of Employment Authorization Documentation for Salvadorans, 67 Fed. Reg. 46,000, 46,000–01 (July 11, 2002).

[62] Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 895 (Jan. 7, 2015). Extension of the Designation of El Salvador for Temporary Protected Status, 67 Fed. Reg. 46,000, 46,000-01 (July 11, 2002).

[63] Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,647 (July 8, 2016) (identifying that the environmental and social conditions plaguing the country spurred an outbreak of mosquito borne illnesses, including chikugunya and dengue).

[64] Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 894 (Jan. 7, 2015) (noting that Tropical Storm Barry hit El Salvador in June 2013, causing flooding, and in December 2013, the Chaparrastique volcano erupted in December 2013, forcing thousands of people to evacuate their homes); Extension of the Designation of El Salvador for Temporary Protected Status, 78 Fed. Reg. 32,418, 32,419 (May 30, 2013); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 77 Fed. Reg. 1710, 1712 (Jan. 11, 2012); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 75 Fed. Reg. 39,556, 39,558 (July 9, 2010); Extension of the Designation of Temporary Protected Status for El Salvador, Automatic Extension of Employment Authorization Documentation for El Salvadorian TPS Beneficiaries, 71 Fed. Reg. 34,637, 34,638 (June 15, 2006).

[65] Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg.

> for Salvadorans in January 2018, Secretary Nielsen ignored the contemporary realities of life in El Salvador by asking only whether disruptions traceable to the 2001 earthquakes had abated. The Secretary relied on generic platitudes,[66] ignoring natural and environmental disasters, pervasive gang violence, mass food insecurity, and other humanitarian crises since the 2001 earthquake.[67]

v. Violation of the Administrative Procedure Act

Lastly, Plaintiffs' assert another unique claim, "Defendants' sudden and unexplained departure from decades of consistent interpretation and corresponding practice violates the Administrative Procedure Act."[68] Plaintiffs' continue to allege, "Defendants' termination of the TPS designations for El Salvador, Haiti, Nicaragua, and Sudan constitutes "final agency action for which there is no other adequate remedy in a court" pursuant to 5 U.S.C. § 704, because the Defendants' termination results in the TPS Holders' loss of TPS "automatically and without further notice or right of appeal," 8 C.F.R. § 244.19."[69]

They also assert, "adoption of a new, drastically narrower interpretation of the TPS statute was arbitrary, capricious, and contrary to law in violation of the APA because it represented a sudden and unexplained departure from decades of decision-making practices and ordinary procedures."[70] Plaintiffs' support their claim, "[b]y shifting the decision-

893, 895 (Jan. 7, 2015) (considering that almost half of all Salvadorans lived in poverty, a third were underemployed, and El Salvador's annual GDP growth fell way behind its neighboring countries); Extension of the Designation of El Salvador Under Temporary Protected Status Program, Automatic Extension of Employment Authorization Documentation for El Salvador, 68 Fed. Reg. 42,071, 42,072 (July 16, 2003) (considering that a large number of returnees would "creat[e] social unrest and exacerbat[e] a critical crime situation")

[66] Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2656 (Jan. 18, 2018).

[67] *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 23-24.

[68] *Id*. at 3.

[69] *Id*. at 34.

[70] *Id*.

governing standard for country designations without explanation, Defendants have ignored a clear statutory command and engaged in procedurally flawed decision-making."[71] Further, Defendants changed their policy without taking into account the serious reliance interests that their prior policy had engendered. Plaintiffs' reiterate that the current Administration has adopted a new interpretation to disclose its rationale and instead of formally publishing this new rationale members of the administration simply talked about their new decision-making process.[72] This is further evidenced through a statement by Secretary Nielsen, "[t]he law does not allow me to look at the country conditions of a country writ large. It requires me to look very specifically as to whether the country conditions originating from the original designation continue to exist."[73]

vi. Motion to Dismiss

Like in *NAACP and Centro*, Defendants argue that, '"[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state" for TPS relief. 8 U.S.C. § 1254a(b)(5)(A).'' Motion to Dismiss [Dkt. # 20] at 35. They further note:

> Although Plaintiffs omit any citation to this judicial-review preclusion provision (see Compl. ¶ 13 (Dkt. No. 1)), they implicitly try to avoid it by claiming that they "do not challenge the TPS terminations themselves under the APA, but rather the adoption of Defendants' new rule barring consideration of other post-designation events.

Id.

[71] *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 21-22.
[72] *Id.*
[73] *Oversight of the United States Department of Homeland Security Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 16, 2018) (statement of Kirstjen M. Nielsen, Secretary, U.S. Department of Homeland Security).

When discussing Plaintiffs' APA arbitrary-and-capricious claim, Defendants stated:

> like their constitutional claims—remains a challenge to the factors and criteria that the Secretaries used in making their respective TPS determinations. See, e.g., Compl. ¶ 122 (alleging Defendants ignored the "serious reliance interests that their prior policy had engendered" in violation of the APA). Congress expressly prohibited such a challenge, and this Court has no jurisdiction to entertain Plaintiffs' attempt to plead around it by alleging a "new rule"—that does not exist—to serve as a proxy for the underlying TPS determinations entrusted to DHS by statute.

Id.

a. Plaintiffs' claims fail as a matter of law

Defendants argued, '[a]t the outset, all of Plaintiffs' claims are premised on their unfounded allegation that Acting Secretary Duke and Secretary Nielsen adopted a "new rule for making TPS determinations," and were "motivated in significant part by racial and national-origin animus."' *Id.* at 38. They support this by stating, "[f]irst, Plaintiffs concede that there is no actual "new rule": "no relevant statute or regulation has changed[.]" Compl. ¶ 75. Nor do they point to any prior "interpretive rule" advising the public of the government's interpretation of the statute." *Id*. In addition, "prior Administrations repeatedly terminated TPS because the conditions leading to the original designation no longer satisfied the TPS statute's criteria—precisely the standard Plaintiffs allege Secretaries Duke and Nielsen wrongfully utilized here." *Id*. To support this notion Defendants proffer that, "intervening conditions were generally considered by prior Administrations only to the extent that they could be linked to or impeded recovery from the event underlying the designation, as the extensions for the countries at issue here make clear." *Id*. at 39. Lastly, Defendants claimed "prior Administrations have terminated TPS despite ongoing problems in the designated countries of the types Plaintiffs allege here." *Id*. at 40.

1. Plaintiffs' Due-Process "Family Integrity" Claim Fails as a matter of law

Defendants attempt to negate the following arguments:

> 1) that withdrawing TPS for their unlawfully present parents would compel the children to live abroad, Compl. ¶ 102; 2) that they have a First and Fifth Amendment right "to live with and be raised by their parents," id. ¶ 103; and 3) that they "have a powerful interest in not being compelled to choose between [the] alternatives" of remaining in the United States or relocating to their parents' home country, id. ¶ 104.

They provide Ninth Circuit case law which stated, '"the generic right to live with family is far removed from the specific right to reside in the United States with non-citizen family members."' Id. at 42 (quotation omitted).

In summarizing their legal argument that asserted, '[s]tated another way, to indulge this theory is to hold that an illegal alien with United States citizen family members cannot be removed, regardless of the illegality of that alien's entry into the United States or conduct while within its borders."' *Id*. at 43.

2. Plaintiffs have failed to allege an equal-protection violation

The arguments set forth in this subgraph are those set forth both in *NAACP* and *Centro, supra*.

3. Plaintiffs' Arbitrary Action Due Process Claim must fail

Defendants asserted:

> the Secretaries gave rational reasons for terminating TPS for Sudan, Nicaragua, Haiti, and El Salvador. There has been no reversal of "decades of established TPS policy," and, even if there had been, such a reversal would be entirely consistent with the discretion vested in the Secretaries by Congress and would not be subject to judicial review.

Id. at 52.

They also argued, "Plaintiffs' protestations about the "serious reliance interests" of TPS recipients and their families (id. ¶ 120) overlooks that TPS is, by conscious design, a program to provide temporary protected status." *Id*.

4. Plaintiffs APA Arbitrary-and-capricious claim must be dismissed

The argument presented is, “this Court has no jurisdiction over Plaintiffs’ APA claim under 5 U.S.C. § 701(a)(1), consistent with the judicial preclusion provision at 8 U.S.C. § 1254a(b)(5)(A) that precludes all of Plaintiffs’ claims.” *Id*. Moreover: “[t]his “new rule” does not exist and, in any event, Plaintiffs cannot obtain this Court’s review of the factors and criteria on which the Secretaries relied and of the sufficiency of their explanations for their decisions through the guise of asserting that they are challenging a change in agency rules. *Id*.

vii. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss

a. This Court has subject matter jurisdiction over all of Plaintiffs’ claims

1. Section 1254(a)(5)(A) does not apply because it bars review only of “determinations” under this subsection

Plaintiffs responded to Defendants’ motion to dismiss by arguing,

> Section 1254a(b)(5)(A) does not bar jurisdiction over Plaintiffs’ APA claim because Plaintiffs do not challenge any particular TPS termination decision—i.e., any “determination”—but rather the underlying rule adopted by the Trump Administration for its recent TPS decisions. In addition, Plaintiffs’ claims arise under the APA and the Constitution, not “under this subsection.”

Id. at 10.

When discussing the notion of “under this subsection” Plaintiffs asserted, “[t]he Supreme Court has strongly suggested that APA claims do not originate “under this section” in an analogous context, because arbitrary agency action and action outside of statutory limits originates “under the Administrative Procedure Act,” rather than any particular administrative law statute.” *Id*. at 12.

2. Section 1254(a)(b)(5)(A) cannot bar constitutional claims

Plaintiffs offered two arguments with the first being, "Congress has explicitly referenced constitutional claims elsewhere in the immigration code's jurisdictional provisions, but did not here." *Id*. at 13. Second, "Congress must speak with exceptional clarity to foreclose judicial review of constitutional claims due to the serious separation of powers problems that such a scheme would create." *Id*. (citation omitted).

A novel claim was asserted:

> [E]ven were this Court somehow to find Plaintiffs' other claims barred, it plainly has jurisdiction over the citizen children's constitutional claim. That claim is not even arguably a challenge to a determination to terminate TPS. The claim asserts that the Constitution requires the Government to put forth a significant interest when it forces school-aged U.S. citizen children to choose between two fundamental rights—remaining in their country and remaining with their parents—and that the Government has no such interest here.

Id. at 15.

b. Plaintiff TPS holders adequately allege each of their claims for relief

1. Plaintiff TPS holders adequately allege an APA violation

Plaintiffs proffer, "TPS holders allege that Defendants established a new rule that departed from longstanding policy and practice by refusing to consider intervening natural disasters, conflicts, and other serious social and economic problems when deciding to terminate TPS." *Id*. at 16.

They offer several avenues of reasoning, (1) "Defendants do not contest that a sub silentio departure from long-standing policy and practice violates the APA." *Id*., (2) "Defendants suggest the lack of any regulation or "formally published . . . documents" describing the prior policy proves none existed. MTD at 38. However, many cases raising unexplained departure claims involved informal guidance or past practice." *Id*. at 17., (3) "Defendants also suggest the termination notices themselves justify their shift in policy. MTD at 39. But the termination

notices (like the statements of Secretaries Kelly and Nielson describing DHS's new rule, Compl. ¶¶ 76-78) fail to explicitly acknowledge a change or give any reason—let alone a good one—for declining to consider intervening circumstances." *Id.*, and (4) "[f]inally, even if the Court accepts Defendants' version of the facts (which it cannot do at this stage) and finds that DHS had no rule and no consistent prior policy or practice with respect to intervening events—sometimes considering them, sometimes not—such inconsistency is itself is arbitrary and capricious." *Id.*

2. Plaintiffs have stated an equal protection violation

Laying out the framework, "Courts apply strict scrutiny to assess plausible allegations that a defendant was motivated, at least in part, by a discriminatory purpose based on race or national origin." *Id.* at 18 (citation omitted).

Plaintiffs iterate the factors under *Arlington Heights* and provide similar evidence as in the *Centro* case to satisfy each factor. Plaintiffs asserted:

> To be clear, no Supreme Court or Ninth Circuit case holds that rational basis review is the appropriate standard for intentional race discrimination claims in any context, including immigration law. In fact, both the Supreme Court and the Ninth Circuit have made clear that claims of intentional discrimination by the government on the basis of race—such as Plaintiffs allege here—are always subject to strict scrutiny

Id. at 27.

3. Plaintiffs have stated a Fifth Amendment claim for arbitrary deprivation of TPS-holders' liberty and property interests

They continued, "Plaintiffs' liberty interest in rational TPS-related decisionmaking also arises from the right to live and work in this country that TPS provides. The Constitution protects individuals from deprivation of these protected interests without due process." *Id.* at 29.

c. Plaintiffs have stated due process claims for the U.S. citizen child plaintiffs

When looking at the claims of child plaintiffs, "the Government must show a significant interest where it seeks to force tens of thousands of school-aged U.S. citizen children to choose between the exercise of two precious constitutional rights." *Id*. at 30. They argued:

> But Defendants identify no interest applicable to these parents, all of whom have lawfully resided here for decades without significant criminal history, and none of whom have done anything, let alone a criminal act, to prompt the Government's policy change. Nor do prior cases focus on the particular interests asserted by the child Plaintiffs, who seek to avoid being forced to go to countries recently labeled unsafe by keeping their parents here temporarily, just until they reach adulthood.

Id.

1. Defendants' actions substantially burden two constitutional rights

First, "it has been indisputable that children born here have "the absolute right" to reside in this country." *Id*. at 31 (citation omitted). Second, 'these children also have a constitutional right to live with their parents, free from unwarranted governmental intrusion. It is well-established that the government may not "intrud[e] on choices concerning family living arrangements" without significant scrutiny."' *Id*. at 32. (citation omitted).

viii. Order Denying Defendants' Motion to Dismiss

On August 06, 2018, the Court filed an order denying Defendants' motion to dismiss. The Court ordered the following:

a. Jurisdictional Bar—Dismissal Under Rule 12(b)(1)

1. Section 1254a Does Not Preclude Challenges to General Collateral Practices

To help provide context the Court stated:

> The TPS statute precludes review of the ―any determination . . . with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.‖ 8 U.S.C. § 1254a(b)(5)(A) (emphasis added). The statute does not define ―determination,‖ but it is evident from the statutory context that this provision refers to the designation, termination, or extension of a country for TPS. (citations omitted). There is no clear provision stating

> ―determination‖ refers to, e.g., general procedures or criteria applied in making such country-by-country determinations.

Order Denying Defendants' Motion to Dismiss, [Dkt. #55] at 16.

The Court reasoned: "[h]ere, Plaintiffs challenge, inter alia, DHS‘s change in interpretation of the TPS statute (a general procedural issue), not an individual determination. 14 The Department‘s general interpretation of the TPS statute is a question distinct from the Department‘s designation or termination of a particular country‘s TPS status." *Id*. at 18.

i. Section 1254a Does Not Preclude Colorable Constitutional Claims

The Court found, "[h]owever, there is no ―clear and convincing evidence that Congress intended to preclude the Court from reviewing constitutional challenges of the nature alleged here. Indeed, as Plaintiffs point out, where Congress otherwise intended to preclude review of all constitutional claims in the INA, it said so explicitly." *Id*. at 21.

To support this reasoning the Court asserted:

> Section 1254a does not reflect a clear Congressional intent to preclude this Court from reviewing Plaintiffs‘ constitutional challenges to the Secretary‘s determinations. The substance of Plaintiffs‘ constitutional challenges is far afield of fact-based criteria that are ―closely tied‖ to administration of the TPS statute. While the Secretary‘s evaluation of particular facts based on statutory criteria under 8 U.S.C. § 1254a(b)(1)(A)-(C) may be ―closely tied to the application and interpretation of statutes related to‖ the Secretary‘s decisions, ascertaining whether the decision is driven by unconstitutional racial animus is not.

Id. at 22.

b. Motion to Dismiss

1. APA Claim

The Court found that Plaintiffs plausibly alleged a change in practice or policy. The Court stated, "As the highlighted language in these footnotes demonstrates, prior administrations

considered subsequent, intervening events such as droughts extending TPS status. In some cases, such intervening events were considered irrespective of whether they had any causal relationship to the original TPS designation." *Id*. at 28-30. The Court recognized that, "the termination notices for Sudan, Haiti, Nicaragua, and El Salvador fail to address numerous conditions that justified extensions of TPS status in the most recent notices issued by prior administrations. *Id*.

2. U.S. Citizens' Children's Due Process Claim to Family Integrity

The Court noted, 'to establish a claim ―"a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property."' (citation omitted). The Court stated, "But Plaintiffs have not cited any cases addressing whether the government's application of such indirect pressure may constitute a violation of substantive due process, and if so, under what circumstances.

The Court held, "[i]t is well-settled that children have a liberty interest in living with their parents. (citation omitted) However, Plaintiffs have not cited any case where this interest was deemed sufficient to prevent the enforcement of a legitimate immigration law to remove a person at the cost of family separation." *Id*. at 35. Further, "[t]he Government cites a litany of cases rejecting the notion that immigration enforcement resulting in family separation inherently violates a U.S. citizen's constitutional rights." *Id*. at 36.

Moreover:

> Plaintiffs also assert the ―unconstitutional choice‖ doctrine in advancing their due process claim. See Simmons v. United States, 390 U.S. 377, 394 (1968) (it is ―intolerable that one constitutional right should have to be surrendered in order to assert another‖). However, while the Court recognizes that U.S.-citizen children Plaintiffs will face the difficult and unenviable choice between living in the United States or abroad with their parents in a land they have never known, the ―unconstitutional choice doctrine appears inapt.

Id. at 37.

3. TPS-Beneficiaries' Due Process Claim

The Court notes: "Plaintiffs assert two bases for the liberty interest asserted here: a ―property‖ interest conferred by the TPS statute in remaining in the U.S. so long as their countries of origin are unsafe, and a liberty interest based on the right to live and work in the United States conferred by the TPS statute." *Id*. at 39.

i. Property Interest

The Court provides:

> To constitute a protected property interest, an individual must have ―more than an abstract need or desire‖ or ―unilateral expectation‖ for a benefit, but rather a ―legitimate claim of entitlement‖ based on, inter alia, ―existing rules or understandings that stem from an independent source such as state law,‖ a ―statute defining eligibility,‖ a contract ―creat[ing] and defin[ing]‖ certain terms, or some other ―clearly implied promise.‖ See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 576-78 (1972)

Finding, " the Court generally may not review the Secretary's factual evaluation of country conditions. Nevertheless, if the Secretary's determination is unlawful for other reasons, Plaintiffs may state a due process claim." *Id*. at 41.

ii. Liberty Interest

The Court understands that, "Plaintiffs' also assert a liberty interest arising from the fact that the TPS statute permits them to live and work in this country." *Id*. at 41.

The Court surmised:

> The Court is doubtful whether Plaintiffs can state such a viable due process claim absent Defendants' violation of the APA or Equal Protection. In essence, Plaintiffs claim that although the protection they received was ―temporary‖ in name, it became ―permanent‖ or ―long-term‖ in actual administration and practice and thus gave rise to important interests protected by due process. (citations omitted). But this theory ignores the explicitly temporary nature of the TPS status." *Id*. at 41-42.

4. Equal Protection Claim

i. President Trump's Alleged Animus is Attributable to the Secretary of Homeland Security

The Court found, "Defendants are incorrect. Even if Acting Secretary Duke and Secretary Nielsen do not personally harbor animus towards TPS-beneficiaries from Haiti, El Salvador, Nicaragua, and Sudan, their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decisionmaking process." *Id*. at 43.

ii. Under *Arlington Heights*, Plaintiffs Need Not Rely on a Comparator Croup and May Rely Instead on Direct Evidence of Discriminatory Intent

The Court recognizes, "[u]nder Arlington Heights, government action may violate equal protection if a discriminatory purpose was one motivating factor." *Id* at 44.

Furthermore, "Plaintiffs need only plausibly plead direct or circumstantial evidence of discriminatory intent; they do not need specifically to plead that a group of similarly situated persons were treated more favorably to demonstrate discriminatory intent." *Id*. at 46.

iii. *AADC* Does Not Apply To this Case

The Court reiterated, "[t]he Government argues that, under Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (―AADC‖), strict scrutiny does not apply in the immigration context even where a claim of animus against a protected group is plausibly alleged." *Id*. But found, 'the AADC standard confining discrimination claims to ―outrageous‖ cases is limited to challenges to the exercise of prosecutorial discretion, i.e., the ―discretion to choose to deport one person rather than another"' *Id*.

iv. *Trump v. Hawaii* Does Not Require a Different Outcome

The Court noted:

> The case at bar is distinguishable from Trump in several respects. First, Defendants herein did not cite national security as a basis for terminating TPS. Second, unlike the Proclamation in Trump, Defendants have not claimed that TPS has been terminated for foreign policy reasons. Third, the TPS-beneficiaries here, unlike those affected by the Proclamation in Trump, are already in the United States. Fourth, relatedly, aliens within the United States have greater constitutional protections than those outside who are seeking admission for the first time. Fifth, the executive order at issue in Trump was issued pursuant to a very broad grant of statutory discretion…"

Id. at 49-53.

v. Application to P' Allegations

The Court recited several examples, posed by Plaintiffs, of President Trump's racially charged statements and found that, "[t]hese allegations are more than sufficient to support a plausible inference of the President's animus based on race and/or national origin/ethnicity against non-white immigrants in general and Haitians, Salvadoreños, Nicaraguans, and Sudanese people in particular." *Id*. 54.

Moreover, Plaintiffs plausibly allege that President Trump's animus was a factor in the TPS termination decisions in question. Courts found, "President Trump harbored racial and national origin/ethnic animus as of the time of all four TPS decisions challenged in this case." *Id*. at 55.

Further, Plaintiffs plausibly allege that President Trump influenced DHS's decision to terminate TPS status. Citing several examples of when the White House commented on TPs countries, "these allegations support a plausible inference that the White House has proactively inserted itself into DHS's TPS termination decisions during the relevant time period of October 2017 to January 2018 when the termination decisions were announced as part of its broader agenda on immigration." *Id*. at 56.

ix. Order Granting Plaintiffs' Preliminary Injunction

The Court summarized, "[c]urrently pending before the Court is Plaintiffs' motion for a preliminary injunction. Plaintiffs seek to enjoin the government from implementing or enforcing the decisions of the Secretary of the Department of Homeland Security to terminate TPS designations of these countries pending a final resolution of the case on the merits." At 2. The Court continued:

> As described below, absent injunctive relief, TPS beneficiaries and their children indisputably will suffer irreparable harm and great hardship. TPS beneficiaries who have lived, worked, and raised families in the United States (many for more than a decade), will be subject to removal. Many have U.S.-born children; those may be faced with the Hobson's choice of bringing their children with them (and tearing them away from the only country and community they have known) or splitting their families apart. In contrast, the government has failed to establish any real harm were the status quo (which has been in existence for as long as two decades) is maintained during the pendency of this litigation. Indeed, if anything, Plaintiffs and amici have established without dispute that local and national economies will be hurt if hundreds of thousands of TPS beneficiaries are uprooted and removed.

Id.

I. Discussion

a. Legal Standard

"[The] purpose of a preliminary injunction . . . is to preserve the status quo and the rights of the parties until a final judgment issues in the cause." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010) . . *Id.* at 7. The Court emphasized that under the *Winter* standard a party seeking preliminary injunction must show, "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)." *Id.* at 8. If a party cannot satisfy that standard they must show, "there are 'serious questions going to the merits' – a lesser showing than likelihood of success on the merits

– then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied."' *Id*.

b. Likelihood of Irreparable Injury/Balance of Hardships/Public Interest

The Court asserted, "[t]he record evidence establishes a compelling case as to these factors in favor of Plaintiffs. Plaintiffs have submitted a number of declarations which establish that, without a preliminary injunction, TPS beneficiaries are likely to suffer irreparable injury." *Id*. at 8. To support the a likelihood of irreparable injury:

> TPS beneficiaries thus risk being uprooted from their homes, jobs, careers, and communities. They face removal to countries to which their children and family members may have little or no ties and which may not be safe. Those with U.S.-citizen children will be confronted with the dilemma of either bringing their children with them, giving up their children's lives in the United States (for many, the only lives they know), or being separated from their children.

Id.

Additionally, to underscore harm to the public interest, 'many TPS beneficiaries are part of the workforce and have a significant presence in the construction, hospitality, food service, landscaping, home health care, child care, and retail industries." *Id*. at 9. Furthermore:

> Without a preliminary injunction, these TPS beneficiaries will no longer be able to work, thus adversely impacting state and local economies. The State Amici estimates that "loss of legal status for these TPS holders is projected to cost \$132.6 billion in GDP (due to lost earnings as well as decreased industry outputs), \$5.2 billion in Social Security and Medicare contributions, and \$733 million in employers' turnover costs."

Id. at 10.

The Government does not challenge the evidence compiled by Plaintiffs but instead offers two other arguments:

> (1) Plaintiffs will suffer an irreparable injury only if they prevail on the merits and Plaintiffs are likely to lose on the merits and (2) Plaintiffs' injuries

> "are inherent in the temporary nature of TPS status" – *i.e.*, "[a] TPS beneficiary is . . . always subject to the same uncertainties and concerns that Plaintiffs allege here" because the TPS program is inherently temporary in nature. (citation omitted).

Id. at 11.

The Court finds that both arguments fail and notes the government's, "first argument is problematic because it effectively makes the factor of likelihood of success on the merits dispositive. But likelihood of success on the merits is not the sole consideration at the preliminary injunction phase; rather, irreparable injury and the balance of hardships must also be taken into account." *Id*. at 12. Additionally, "[t]he government's second argument fares no better. Although the TPS program is temporary in nature, that does not mean that Plaintiffs' injuries claimed herein are the purely result of the temporary nature of the program as opposed to the government's actions." *Id*. The Court rationalizes:

> The bottom line is there is nothing in the record establishing the continued presence of TPS beneficiaries in the United States causes harm to the country; in contrast, if the Court were to deny an injunction, Plaintiffs stand to suffer substantial irreparable injury. Any ultimate adjudication on the merits in their favor may come too late if they have been removed prior to final adjudication. Once the TPS beneficiaries are removed, the government's actions – if deemed unlawful in this lawsuit – could not practically be undone.

Id. at 14.

c. Likelihood of Success on the Merits/Serious Questions Going to the Merits

The Court stated, "Plaintiffs argue that they are likely to succeed, but, at the very least, there are serious questions going to the merits, on both their APA and Equal Protection claims." *Id*. at 15.

1.APA Claim

With regard to the APA claim, "[b]ased on the legal standard, all that Plaintiffs must show to establish a likelihood of success on the merits – or least serious questions going to the merits –

is a change in DHS practices with respect to TPS designations. There is no dispute that DHS never acknowledged any change in practice and thus has not provided any explanation for any such change." *Id.* at 17. The Government argues:

> even if Plaintiffs are allowed to challenge the process related to a TPS designation, they have still failed to show that there is any new policy or practice that would trigger the APA's procedural requirements (*i.e.*, an acknowledgment of the change in policy or practice and an explanation thereof). According to the government, there have simply been "variations in how different Secretaries render their fact-intensive TPS determinations" – "at most a difference in emphasis rather than what could plausibly be considered a 'new rule.'"

Id. at 19.

In response:

> The Court disagrees. There is a wealth of record evidence to support Plaintiffs' position that the DHS changed its practices with regard to TPS designations – notably, evidence *beyond* a comparison of the Federal Register Notices on TPS designations before and after the Trump administration took over which this Court previously undertook.

Id.

The Court concluded:

> Accordingly, the Court concludes that not only have Plaintiffs have shown serious questions going to the merits, they have demonstrated a likelihood of success on the merits for their APA claim. DHS made a deliberate choice to base the TPS decision solely on whether the originating conditions or conditions directly related thereto persisted, regardless of other current conditions no matter how bad, and that this was a clear departure from prior administration practice.9 This departure was a substantial and consequential change in practice – indeed, as the government now argues, it could violate the TPS statute itself. The government has offered no explanation or justification for this change. The evidence submitted by Plaintiffs (discussed above and below) suggests this change may have been made in order to implement and justify a pre-ordained result.

Id. at 27.

2.Equal Protection Claim

Arlington Heights

The Court determined that Arlington Heights provides the governing legal standard and state:

> Under *Arlington Heights*, "[p]roof of a racially discriminatory intent or purpose of required to show a violation of the Equal Protection Clause," and, "[w]hen there is proof that a discriminatory purpose has been a motivating factor in the [government's] decision, . . . judicial deference [to that decision] is no longer justified." *Arlington Heights*, 429 U.S. at 265-66.

Id. at 27.

The Court found that:

> Here, Plaintiffs have provided sufficient evidence to raise serious questions as to whether a discriminatory purpose was a motivating factor in the decisions to terminate the TPS designations. In particular, Plaintiffs have provided evidence indicating that (1) the DHS Acting Secretary or Secretary was influenced by President Trump and/or the White House in her TPS decision-making and (2) President Trump has expressed animus against non-white, non-European immigrants.

Id.

Trump v. Hawaii

The Court finds that *Trump v. Hawaii* is inapplicable while the:

> The government protests that the above analysis is incorrect because *Arlington Heights* does not provide the proper legal standard and that the Equal Protection claim should be evaluated based on the deferential standard articulated in *Trump v. Hawaii*, 138 S. Ct. at 2392. But this is essentially a request for reconsideration of the Court's prior order denying the government's motion to dismiss.

Id. at 37.

Even if the Court were to reconsider application of *Trump v. Hawaii* the government's argument would fail because, "the case involved 'the entry of aliens from outside the United States, express national security concerns[,] and active involvement of foreign policy.'" *Id*. at 38.

Supporting the Courts finding:

> The instant case was distinguishable from *Trump v. Hawaii* because (1) there was no indication that national security or foreign policy was a reason to terminate TPS designations15; (2) unlike the aliens in *Trump v. Hawaii*, the aliens here (*i.e.*, the TPS beneficiaries) are already in the United States and "aliens within the United States have greater constitutional protections than those outside who are seeking admission for the first time"; and (3) "the executive order in *Trump [v. Hawaii]* was issued pursuant to a very broad grant of statutory discretion" whereas "Congress has not given the Secretary *carte blanche* to terminate TPS for any reason whatsoever."'

Id.

On October 11, 2018 Defendants filed a Notice of Appeal to the 9th Circuit Court of Appeals. The Court, on October 26, 2018, granted Defendants' Stipulation to Stay District Court Proceedings Pending Appellate Review of Preliminary Injunction.

D. *Saget v. Trump,* No. 18-01599 (E.D.N.Y filed Mar. 15, 2018)

Saget v. Trump, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) was filed in the U.S. District Court for the Eastern District of New York on March 15, 2018. Plaintiffs' in this case include Haïti Liberte, a newspaper relying on the writing skills of Haitian TPS recipients, Family Action Network Movement, Inc, an organization who expended resources assisting TPS recipients, and several beneficiaries of TPS. *Saget* brought this action against President Donald Trump, the United States of America, Department of Homeland Security, Elaine Duke Acting Secretary of Homeland Security, and Kristjen Nielsen Secretary of Homeland Security ("Defendants").

i. Violation of Administrative Procedures Act

Plaintiffs' in *Saget v. Trump*, like those in *Ramos v. Nielsen*, claim that Defendants' violated the Administrative Procedures Act. First, they claim, [a]lthough the TPS statute provides for, no judicial review of any determination of the DHS Secretary with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection,

'"Plaintiffs are not challenging the TPS "determination" itself but the "practice or procedure employed in making [termination] decisions" by Defendants"'.[74]

Plaintiffs' support this claim by asserting, "Defendants' termination of Haitian TPS constitutes final agency action; is arbitrary and capricious; an abuse of discretion; otherwise not in accordance with the law; is an excess of statutory authority; and was undertaken without observance of procedure requires by law."[75] Plaintiffs' recognize, "Defendants' employed an invalid and unauthorized process to terminate Haiti's TPS designation irrespective of the statutory criteria for review by Congress."[76] Plaintiffs'' further assert Defendants' process does not, "ensure the protection of noncitizens vulnerable to extraordinary environmental, geopolitical, health and/or other human tragedies, and Defendants abandoned without explanation or justification their well-established standard for reviewing designation."[77]

Plaintiffs' provide further evidence that Secretary Kelly abandoned prior standards for reviewing designations, "Kelly indicated that he would only look at "the earthquake" in Haiti—not the other "horrible conditions"—even though past Secretaries have looked at a range of "extraordinary" conditions to determine whether the TPS extension was warranted."[78] Plaintiffs' also claim, "[t]he word temporary in the program name does not refer to arbitrarily-measured time periods of short duration, but rather to measurable criteria used for regular evaluation of whether extraordinary conditions giving rise to the need for protection continue."[79]

ii. Violation of Due Process

[74] *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 27.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 21.
[79] *Id.*

Like each of the four cases, *Saget* alleges a due process clause violation claiming, Defendants' termination of Haitian TPS "arbitrarily deprives current TPS recipients of the process …, as shown by the Administration's departure from. . . the process for termination of TPS," set forth in 8 U.S.C. § 1254a.[80] Plaintiffs' assert,

> [t]he [termination] announcement ignored the basis for the original and ongoing designation based upon extraordinary conditions under 8 U.S.C. § 1254a(b)(1)(C), which included all of the events enumerated in Kelly's extension. Instead, it summarily asserted that the "extraordinary but temporary conditions caused by the 2010 earthquake no longer exist. The statement failed to explain how—in less than a year—Haiti has managed to overcome the seven key justifications identified by DHS in December 2016 to maintain TPS … [81]

In furtherance of the Due Process claim Plaintiffs' proffer, "the termination was based on the President's irrational beliefs about Haitians, which are not a legitimate government interest, and the termination was based on the President's categorical and defamatory assertions about all Haitians, which the Haitian TPS recipients were given no opportunity to challenge."[82]

iii. Violation of Equal Protection Clause

Additionally, Plaintiffs' assert an equal protection argument, "[t]he termination of Haitian TPS targets Haitians and was motivated by racial and national origin animus toward Haitians."[83] This lawsuit, like the three before it, all provide ample evidence of the administration's racial and national origin animus towards Haitians. Plaintiffs' cite, "DHS announce that it would make

80 *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 28.
81 DHS Press Release, *Acting Secretary Elaine Duke Announcement on Temporary Protected Status* (Nov. 20, 2017), https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protectedstatus-haiti.
82 *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 28-29.
83 *Id*. at 29.

H-2A and H-2B visas for Haitian nationals unavailable, citing "high levels of fraud and abuse," without providing any evidence to support this assertion."[84]

iv. Violation of Administrative Procedure Act: Notice-and-Comment Rulemaking

Plaintiffs' assert a unique claim under the Administrative Procedures Act ("APA"): Notice-and-Comment Rulemaking, "[t]he termination of Haitian TPS constitutes a substantive rule, as it binds DHS to deny applications for TPS to individuals who previously met eligibility criteria."[85] Plaintiffs' further the APA claim by alleging, " Defendants' decision to use racial and other criteria not contemplated in the statute or regulations requires DHS to engage in notice-and-comment rulemaking before terminating the designation."[86] Again, Plaintiffs' provided evidence that the administration employed racial and other criteria, "Kelly's remarks indicate that he was focused on terminating Haiti's TPS … rather than evaluating the conditions on the ground as the statute requires, and the [termination] failed to explain how Haiti had managed to overcome the list of extraordinary conditions that existed only months earlier when Kelly had reauthorized Haiti's TPS designation."[87]

v. Violation Regulatory Flexibility Act

[84] Yeganeh Torbati, *Trump administration bars Haitians from U.S. Visas for Low-Skilled Work*, Reuters (Jan. 17, 2018), https://www.reuters.com/article/us-usa-immigration-haiti/trump-administration-bars-haitians-from-u-s-visasfor-low-skilled-work-idUSKBN1F702O.

[85] *Id*.

[86] *Id*. at 29. 5 U.S.C. § § 553(b) & (c) (b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . (c)After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

[87] *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 21-22.

Unlike the aforementioned cases, Plaintiffs' assert another unique claim that DHS violated the Regulatory Flexibility Act because, "DHS failed to conduct any regulatory flexibility analysis to determine how the termination of Haitian TPS will affect small entities, such as Haïti Liberté …"[88] Plaintiffs' provide evidence that Haïti Liberté … is directly affected by the termination of Haitian TPS, because, "it will adversely impact the sales of Haïti Liberté, the largest Haitian newspaper distributed in the United States, should a leading writer be forced to return to Haiti. "[89]

vi. Violation of Ultra Vires

Lastly, Plaintiffs' state an additional new claim, "DHS's termination of the designation of Haiti as a TPS country is ultra vires of the provisions in the Immigration and Nationality Act (INA), which govern the designation, termination, and extension of TPS countries."[90] Plaintiffs' also assert, … from the President's racially motivated desire to remove Haitian TPS holders from the country and DHS's stated focus on the "temporary" nature of the TPS designation, it is clear that DHS's decision was not properly based on the required factors set forth at 8 U.S.C. § 1254a(b)(1)(A-C)."[91] Plaintiffs' further recognize, "[s]ince 2011, DHS has regularly renewed Haitian TPS based on careful consideration of the totality of "extraordinary" conditions affecting Haiti," under 8 U.S.C. § 1254a(b)(1)(C), "including housing shortages; a cholera epidemic; limited access to medical care, food, and water; political instability; the fragile economy; security risks; gender-based violence; and environmental risks, and [t]hese conditions continue to this day."[92] As mentioned above, "[that] statement failed to explain how—in less than a year—

[88] *Id*. at 3.
[89] *Id*. at 3 & 30.
[90] *Id.*
[91] *Id*.
[92] *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 2.

Haiti had managed to overcome the seven key justifications identified by DHS in December 2016 to maintain TPS …"[93]

vii. .Motion to Dismiss

a. This Court Lacks Subject Matter Jurisdiction Over This Action

The Government, like in the aforementioned cases, argues:

> Congress unambiguously provided that "[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state" for TPS relief. 8 U.S.C. § 1254a(b)(5)(A). This judicial review preclusion provision in the TPS statute forecloses all claims in this Court relating to the Secretary's TPS determinations, whether of a statutory or constitutional nature. Id

Motion to Dismiss [Dkt. #59] at 13.

The Government asserts, "Plaintiffs' claims, however, challenge precisely what Congress prohibited: Acting Secretary Duke's "determination … with respect to the … termination … of a foreign state" for TPS relief. 8 U.S.C. § 1254a(b)(5)(A)." *Id*. Furthermore, "[t]his Court has no jurisdiction to entertain Plaintiffs' attempt to plead around this statutory bar by alleging a "new standard" (that does not exist) to serve as a proxy for the underlying TPS determinations entrusted to DHS by statute." *Id*.

When challenging Plaintiffs' constitutional claims they argue, "the Court would first need to probe the sufficiency of Acting Secretary Duke's stated reasons for terminating TPS—the very assessment that Congress foreclosed from judicial review." *Id*. at 14. Additionally:

> Plaintiffs' APA claims are foreclosed by the APA itself. Under 5 U.S.C. § 701(a), the judicial review provisions of the APA do not apply "to the extent that … statutes preclude judicial review." (emphasis added). Because Congress foreclosed review here under 8 U.S.C. § 1254a(b)(5)(A), a plaintiff cannot avoid that bar via the APA. (citation omitted)

Id. at 15.

[93] *Id*. at 22.

b. This Court Lacks Jurisdiction Over the President

In furtherance of the Government's argument they claim, "[t]he Court also does not have subject matter jurisdiction over Plaintiffs' claims against the President, who is sued in his official capacity." *Id*. at 16. Secondarily:

> Even assuming equitable relief might ever lie against the President in the performance of his official duties, it is plainly not warranted here, because Plaintiffs' injury, if any, could be fully redressed through an injunction against DHS and its officials—if, contrary to our submission above, judicial review were permitted at all.

Id. at 17.

c. Even If Reviewable, Plaintiffs' Claims Fail On Their Merits

i. Plaintiffs' APA Claims Should be Dismissed

As the basis for their argument:

> Every Administration since the statute's enactment in 1990 has terminated TPS designations.12 Acting Secretary Duke's decision to terminate the Haitian TPS designation was in keeping with those prior decisions and consistent with Congress's objective of providing temporary relief (subject to mandatory agency review after designated intervals) for nationals of a country recovering from, inter alia, a natural disaster until such nationals, who have not attained other lawful immigration status in the United States, can safely return home. Plaintiffs have not plausibly alleged, and cannot demonstrate, that Acting Secretary Duke acted arbitrarily in her efforts to further that indisputably legitimate interest.

Id. at 18.

ii. Acting Secretary Duke Did Not Adopt a New Standard for TPS Extension Determinations

The Government asserts:

> Subparagraph (A) of 8 U.S.C. § 1254a(b)(3), however, directs the Secretary to periodically "review the conditions in the foreign state . . . for which a [TPS] designation is in effect . . . and . . . determine whether the conditions for such designation . . . continue to be met." 8 U.S.C. § 1254a(b)(3)(A) (emphasis added). "Such designation" plainly refers to the antecedent decision to

> designate a country for TPS under one of the three qualifying circumstances (armed conflict, disaster, extraordinary conditions). It does not, as Plaintiffs suggest, impose on the Secretary a recurring obligation to assess whether any of those qualifying circumstances might apply and, if so, to extend TPS accordingly.

Id. at 20.

In further support:

> Moreover, the basis for Plaintiffs' "new standard" theory is that Acting Secretary Duke ostensibly did not take account of intervening circumstances in finding that conditions in Haiti had improved such that TPS was no longer warranted. But it is clear from the Federal Register notices that the Secretaries considered current environmental, economic, and societal conditions, and those conditions necessarily are impacted by intervening circumstances.

Id. at 21.

iii. Plaintiffs' Notice-And-Comment Claims Fails on the Merits

Like their previous arguments the Government states:

> Plaintiffs' notice-and-comment claim fails for the same reason: nothing about the approach Acting Secretary Duke took in her decision-making as set forth in the Federal Register is inconsistent with past practice. But even assuming, arguendo, that there were some difference between DHS's current application of 8 U.S.C. § 1254a and its application during prior Administrations, that difference would amount to, at most, a shift in interpretation made in particular determinations, not a "substantive rule" as Plaintiffs have alleged.

Id. at 22.

iv. Plaintiffs' RFA Claim Fails on the Merits

Subsequently the Government argues:

> The RFA's requirement that an agency publish analyses of a rule's impact on small businesses applies only "when an agency promulgates a final rule under section 553 of . . . title [5], after being required by that section or any other law to publish a general notice of proposed rulemaking," U.S. Telecomm. Ass'n v. FCC, 400 F.3d 29, 42 (D.C. Cir. 2005) (quoting 5 U.S.C. § 604(a))—in other words, only where notice=and-comment procedures are required. Because those procedures were not required here, the RFA does not apply.

Id. at 23.

v. Plaintiffs' *Ultra Vires* Claim Fails on the Merits

Analyzing under the Chevron doctrine:

> Here, the plain language of 8 U.S.C. § 1254a(b)(5)(A) is clear and the Duke Determination is consistent with the plain text of the statute. Even assuming, arguendo, that § 1254a(b)(5)(A) is ambiguous, the Duke Determination is clearly a permissible interpretation of the statute for the reasons set forth above, particularly since it was consistent with longstanding DHS practice.

Id. at 24.

vi. Plaintiffs Fail to Allege A Constitutional Violation

Plaintiffs' Equal Protection Claim is Facially Defective

As the basis for their argument the Government claims:

> Plaintiffs' equal protection claim is facially defective because this case does not involve classifications of groups of aliens for favored (or disfavored) treatment of individuals on the basis of their individual immutable characteristics. Instead, it involves the assessment of internal conditions in Haiti and whether Acting Secretary Duke rationally found that Haiti had sufficiently recovered from the 2010 earthquake such that there no longer are "extraordinary and temporary conditions" preventing the safe return of its nationals.

Id. at 25.

vii. There is a Rational Basis for the Duke Determination

In support of this argument the Government relies on *Hawaii v. Trump* which, "makes clear that, at most, rational basis would be the applicable standard of review given the deference owed to the political branches in this area. 138 S. Ct. at 2418." *Id*. at 26. In analyzing the issue under rational basis the Government asserts:

> Plaintiffs fall far short of their heavy burden in proving an equal protection or due process violation under rational basis review. After consulting with appropriate government agencies as required by statute (including USCIS and the State Department, which both supported her ultimate conclusion (AR 31-32, 33-38, 40-44), Acting Secretary Duke reasonably concluded that Haiti's post-disaster conditions had sufficiently improved to warrant termination of TPS. Although Plaintiffs may disagree with those decisions, Plaintiffs cannot

> show that the Duke Determination, which was authorized (indeed, contemplated) by statute, was so irrational that no conceivable basis could support it.

Id.

viii. Plaintiffs Do Not Meet the Demanding Standard that Would be Necessary for Establishing Racial Animus

The Government concludes, "[t]o make out such an extraordinary claim, it would be necessary for Plaintiffs to put forward facts constituting "clear evidence" of "outrageous" discrimination." *Id*. at 28. In trying to support this argument "[t]o make out such an extraordinary claim, it would be necessary for Plaintiffs to put forward facts constituting "clear evidence" of "outrageous" discrimination." *Id*.

The Court proceeded with oral argument on the motion to dismiss on November 13, 2018 and issued a decision on December 14, 2018.

viii. Order Denying Motion to Dismiss

a. The Court Has Subject Matter Jurisdiction Over this Action

Plaintiffs' Action Generally

The Court referenced to pending cases:

> The defendants in both Ramos v. Nielsen, 321 F. Supp. 3d l 1 83 (N.D. Cal. Aug. 6, 2018), and Centro Presente v. Dep 't of Homeland Sec '.Y, 332 F. Supp. 3d 313 (D. Mass. July 23, 2018), pending in the Northern District of California and the District of Massachusetts, respectively, advanced similar, though not identical, arguments regarding the Courts lack of subject matter jurisdiction. In both cases, the courts found that subject matter jurisdiction existed over the claims of the plaintiffs in those actions. This Court agrees with the holdings of its fellow district courts and finds subject matter jurisdiction exists over Plaintiffs' claims in this case as well.

Order Denying Motion to Dismiss [Dkt. #96] at 5.

Plaintiffs' Claims Against the President

The Court noted, “[t]he factors to consider in determining whether injunctive relief against the President would be appropriate are whether injunctive relief against a lower official or declaratory relief would be an adequate remedy and the level of intrusion into the President's authority.” (citation omitted) *Id*. at 10. Furthermore:

> As the District of Massachusetts found in Centro Presente, the record in this case has not been fully developed regarding "what relief would be appropriate if Plaintiffs prevailed on their claim or whether an injunction against lower officials or declaratory relief would be sufficient." 332 F. Supp. 3d at 419. Because this could be one of the rare case1 in which the extraordinary remedy of injunctive relief against the President could be appropri1te, it is premature to dismiss the President as a party at this time.

Id. at 11.

b. Plaintiffs' Statutory and Ultra Vires Claims Survive Dismissal

APA Claims

The Court found:

> Plaintiffs have plausibly alleged Defendants failed to undertake the required statutory review process by abandoning their well-established standard for viewing TPS designations in favor of a narrower construction. Plaintiffs cite public statements issued by DHS making clear Secretary Duke only considered findings on whether the conditions in supporting Haiti's initial TPS designation continued to exist. (citation omitted) Given that prior decisions extending TPS relied on current country conditions as a whole to def ermine whether an extension was warranted, Plaintiffs have plausibly alleged a policy change.

Id. at 14.

In reciting the law the Court stated, “[t]he APA requires that when an agency engages in rulemaking, it must provide public notice of the proposed rule and an opportunity to comment. 5 U.S.C § 553(b), (c). *Id*. at 15. Additionally, “The APA's notice-and-comment requirement, however, applies only to substantive rules, which create new law, rights, or duties, as opposed to so-called interpretative rules, which do not alter the rights of parties, though they may change

how parties make arguments to an agency." *Id*. As a result, "the Court need not decide whether the new policy Plaintiffs have alleged is an interpretive or substantive rule. Even if the new policy is interpretive, Defendants would be required to provide a reasoned explanation of the change in position." *Id*.

Regulatory Flexibility Act

In a short analysis the Court held, "[b]ecause Plaintiffs' notice-and-comment claim survives dismissal at this stage, Plaintiffs' claim that Defendants violated the RFA by failing to evaluate the TPS termination's economic impact on small business entities should proceed." *Id*. at 16.

Ultra Vires Claim

Resulting in limited analysis the Court found, "[i]f, however, this Court or an appellate court were to h~ld that the APA does not provide a cause of action, Plaintiffs would still be entitled to pursuer standalone ultra vires claim." *Id*. at 16.

c. Plaintiffs' Constitutional Claims Survive Dismissal

Plaintiffs Need Not Show a Similarly Situated Group was Treated Differently and May Rely on Discriminatory Intent

The Court held:

> Plaintiffs bring their equal protection claim under Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1~77). Under Arlington Heights, government actions may violate equal protection if a discriminatory purpose was one motivating factor, id. at 265-66, and Plaintiffs "need not plead or show the disparate treatment of other similarly situated individuals," Pyke v. Cuomo, 258 F.3d 107; 109 (2d Cir. 2001). Plaintiffs are not required to show that the decision to terminate T~S was "motivated solely by" I racial animus, nor that animus "was the 'dominant' or 'primary"' purpose. *Arlington Heights*, 429 U.S. at 265.

Id. at 18.

Neither *Trump v. Hawaii* Nor *Reno v. AADC* Applies Here

In discussing *Trump v. Hawaii* the Court stated:

> [T]wo factors informed the standard of review: 1) "plaintiffs [sought] to invalidate a national security directive regulating the entry of aliens abroad"; and 2) the executive order was "facially neutral toward religion" and this required "prob[ing] the sincerity of the stated justifications for the policy by reference to extrinsic statements -many of which were made before the President took the oath of office." 138 S. Ct. at 2418 (emphasis added). These factors are not present in this case. First, Defendants here do not allege the determination in this case implicates national security concerns, a factor the Supreme Court stressed was I critical in finding the rational basis standard applied in Hawaii. (citation omitted). Second, the foreign nationals at issue in Hawaii were not in the United States.

Id. at 19.

In discussing *Reno v. Am-Arab Anti-Discrimination* the Court held:

> The Supreme Court explained, "[a]s a general matter ... an I ien unlawfully in this country has no constitutional right to assert selective enforcement as a defe se against his deportation." Id. at 488 (footnote omitted). However, the Court did not "rule ou the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome." Id. at 491. Here, the challenged action is not t a specific removal decision and does not implicate prosecutorial discretion. Therefore, AADC s "outrageous" standard does not apply here.

Id. at 20.

Plaintiffs Satisfy the Standard Set by Arlington Heights

The Court in *Arlington Heights* found:

> [T]hat most facially neutral decisions by legislators and administrators, including those that "result[] in a racially disproportionate impact," are subject only to judicial review to determine if the decision was "arbitrar[y] or irrational[ ]"-that is, rational basis review-"because legislators and I administrators are properly concerned with balancing numerous competing considerations."

Id. at 20.

The Court found "Plaintiffs have plausibly alleged an equal protection claim under the standard of *Arlington* Heights. Plaintiffs have alleged several instances of anti-Haitian and anti-immigrant comments made by President Trump." *Id*. at 21. Finally the Court noted that:

> Plaintiffs are not required to show that Acting Secretary Duke personally harbored discriminatory animus. As recently explained in another case in this district in the context of the decision to rescind Deferred Action for Childhood Arrivals (DACT, "[o]ur Constitution vests 'executive Power' in the President, not in the Secretary of DHS, who reports to the President and is removable by him at will." Batalla Vidal v. Nielsen, 291 F. Supp,. 3d 260,279 (E.D.N.Y. 2018) (Garaufis, J.) (citing U.S. Const., art. II, § l, cl. l). "[L]iabiljty for discrimination will lie ! when a biased individual manipulates a non-biased decision-maker into taking discriminatory action." Id (collecting cases). Furthermore, Arlington Heights analysis considers not only the "contemporary statements by members of the decision-making body but also more broadly "[t]he historical background of the decision" and "[t]he specific sequence of events leading up to the challenged decision." Arlington Heights, 429 U.S. at 267. Under the factors prescribed by Arlington Heights, including the combination of statements of animus by people allegedly involved in the decision-making process here and an allegedly unreasoned shift in policy, Plaintiffs have plausibly alleged that a discriminatory purpose was motivating factor behind the decision to terminate TPS for Haiti.

Id. at 22.

III. Conclusion

Over 300,000 individuals residing in the United States are affected by the termination of TPS.[94] TPS recipients are faced with looming deportation, separation from their families, losing businesses and livelihoods, and will experience greater exploitation within the workforce. It is important that TPS recipient's fundamental rights, ensured to them through the Due Process Clause and Equal Protection Clause, are protected. It is necessary that the current Administration be held accountable for their actions. We are hopeful that the filing of four lawsuits will help to stop the current administration's ability to remove hundreds of thousands of TPS recipients who have become part of the fabric of our society.

/ / /

[94] Zuzana Jerabek, *Fact Sheet: Temporary Protected Status*, National Immigration Forum (Feb. 8, 2018) (*available at*: https://immigrationforum.org/blog/fact-sheet-temporary-protected-status/).